

Navajo Nation Law

CLE Conference

Friday, Oct. 19, 2018
8:20 a.m. - 5:15 p.m.

Beus Center for Law and Society
Room 644

111 E. Taylor St., Phoenix, AZ 85004

Conference Materials

These materials are available to attendees
on the conference website:

law.asu.edu/navajolaw
password: navajolawatasu

- Navajo Nation Bar Association has approved this conference for 8 NNBA credits, including 2 Navajo Ethics credits.
- New Mexico MCLE has approved this conference for 6 general credits and 2 Ethics credits.
- State Bar of Arizona does not approve CLE activities, however, this activity may qualify for up to 8 credit hours, including 2 credit hours for Professional Responsibility.
- This event will qualify for 8 MCLE for California, including 1 Legal Ethics credit.



Artwork by Piersten Doctor

Navajo Nation Law CLE Conference Friday, October 19, 2018

Indian Legal Program / Sandra Day O'Connor College of Law / Arizona State University
Beus Center for Law and Society, Room 644
111 E. Taylor Street, Phoenix, AZ 85004

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- This event will qualify for 8 MCLE for California, including 1 Legal Ethics credit.

AGENDA

- | | |
|------------------|--|
| 7:30 – 8:20 am | Check-In & Continental Breakfast |
| 8:20 – 8:30 am | Welcome from the Indian Legal Program

<u>Kate Rosier</u> , Executive Director, Indian Legal Program |
| 8:30 – 10:00 am | Update on Navajo Nation Law (1.5 hours)

Navajo Nation Court Update

<u>Derrick Burbank</u> ('05), Staff Attorney, Shiprock Judicial District

Navajo Legislative Update

<u>Candace French</u> ('17), Staff Attorney, Navajo Nation Office of Legislative Counsel
<u>Jasmine Blackwater-Nygren</u> , 2L ASU law student |
| 10:00 – 11:00 am | Taking Your Turn: Representing Pro Bono Navajo clients (1 hour)

<u>Raven Attwood</u> ('15), Staff Attorney, Office of the Navajo Public Defender

The goal of this CLE course is to provide a toolkit for attorneys called upon by mandatory NNBA pro bono requirements to represent clients in |

criminal or delinquency cases. The lecture will cover the most common types of cases, the procedural timelines, and common issues they may encounter. Navajo criminal law updates as well as where to find the relevant statutes, case law, and rules of procedure will also be covered. Distinctive points of Navajo law, such as the *Kelly* rule for double jeopardy, will be addressed, as well as particulars of restorative justice in sentencing and deferred prosecution, including options such as Value Life Engagement and Peacemaking.

11:00 – 11:15 am **Morning Break**

11:15 – 12:15 pm **The NNBA Rules of Professional Conduct (1 hour Navajo ethics)**

Professor Myles Lynk, Professor of Law, Sandra Day O'Connor College of Law

This presentation provides an overview of the changes to the Navajo Nation Bar Association's Rules of Professional Conduct.

12:15 – 12:30 pm **Boxed Lunch Provided**

12:30 – 1:30 pm **Eminent Domain in Diné Bikeyah: How To Take Public Property For Public Use (1 hour)**

Colin Bradley ('14), Attorney, Bradley Law, PLLC

Edward Hermes ('13), Associate, Snell & Wilmer

This presentation will be about eminent domain on the Navajo Nation. There are many myths surrounding eminent domain on the Navajo Nation, and, indeed, some people do not even believe it exists. We hope to dispel some of these myths by covering the history, statutes, and issues that surround eminent domain on the Navajo Nation. And, finally, we will likely suggest some solutions to its current problems.

1:30 – 2:30 pm **Predatory Lending on the Navajo Nation (1 hour)**

Nicholas H. Mattison, Attorney, Feferman, Warren & Mattison

Attorney Nicholas H. Mattison dedicates his Albuquerque, New Mexico law practice to fighting for consumers. His firm, Feferman, Warren & Mattison, brings individual and class action cases against the predatory lenders who take advantage of members of the Navajo Nation. These cases returned millions of dollars to consumers over the past few years. Mr. Mattison's presentation will explore the many varieties of predatory lending taking place on and around the Navajo Nation. He will provide concrete examples of predatory practices he has challenged, and will offer strategies for helping consumers to avoid harmful debt traps. The presentation will cover federal, state, and tribal law that can be used to protect consumers.

2:30 – 2:45 pm **Afternoon Break**

2:45 – 3:45 pm

Application of the Native American Child Safety Act in Navajo Nation Family Courts (1 hour)

Christopher B. Chaney, Unit Chief - Criminal Justice Information Law Unit, FBI Office of General Counsel

In 2016, Congress passed the Native American Child Safety Act (NACSA), which in essence requires tribal social service agencies to do background checks of tribal court ordered foster parents. While this law is a federal enactment, it directly impacts attorneys/advocates that represent parents and foster parents, tribal court appointed guardians ad litem, attorneys/advocates advising Navajo Nation Social Services, and proceedings in Navajo Nation Family Court. The presentation will be in a lecture format aided by a Power Point presentation with opportunities for active Q&A interaction with the presenter. Other legal authorities that authorize Navajo Nation government agencies to access FBI maintained criminal history record information for background check purposes will also be discussed.

3:45 – 5:15 pm

***Diné Bi Beehaza'áanii Bitsé Siléí*, What to Do and What Not to Do (0.5 hour Navajo law and 1.0 hour Navajo ethics)**

Robert Yazzie, Chief Justice Emeritus of the Navajo Nation

The examination of *Diné* Fundamental Law as a framework, its meaning and application for purposes of problem solving from the *Diné* understanding and experience will be discussed with emphasis on *Diné Bi Beehaza'áanii Bitsé Siléí*, which means “what is permitted and what is not permitted” that guides conduct and action by *Diné* core value.

5:15 pm

Adjourn

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(*) Addendum material under separate cover

These materials are available to attendees in digital form on the conference website at:

law.asu.edu/navajolaw

Password: navajolawatasu

Conference Planning Committee:

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ILP Blog at **law.asu.edu/ilpblog**

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Navajo Nation Law CLE

Section 1

Conference Speaker
Biographies

Navajo Nation Law CLE Conference

Friday, October 19, 2018

Indian Legal Program / Sandra Day O'Connor College of Law / Arizona State University
Beus Center for Law and Society, Room 644
111 E. Taylor Street, Phoenix, AZ 85004

Speaker Biographies

Raven J. Attwood

Staff Attorney, Office of the Navajo Public Defender

Raven Attwood graduated from Sandra Day O'Connor College of Law in 2015 with a Juris Doctor and Indian Law Certificate. He was admitted to the Navajo Nation Bar in 2016 and has worked for the Office of the Navajo Public Defender for three years. Mr. Attwood represents indigent clients in criminal and delinquency matters in the Kayenta, Tuba City, and Dilkon Judicial Districts.



Jasmine Blackwater-Nygren
2L, ASU Law

Hasht'ishnii nishť dóó 'Áshijhí báshishchíín. Nóoda'í dine'é Táchii'nii dashicheii dóó Bit'ahnii dashináí.

Jasmine is a second-year law student at Arizona State University. She graduated from Stanford University in summer 2017 with a Bachelor of Arts in Science, Technology, and Society with a concentration in the Environment and Sustainability and a minor in Native American Studies. In summer 2018, Jasmine worked at the Navajo Nation Office of Legislative Counsel. Jasmine is currently working for the Fort McDowell Yavapai Nation Office of General Counsel.



Colin Bradley
Attorney, Bradley Law, PLLC

Colin Bradley is the owner/founder of Colin Bradley Law, PLLC—which is a boutique law firm specializing in litigation and Indian law. Mr. Bradley has extensive litigation experience in the courts, and administrative tribunals, on the Navajo Nation. Prior to starting his own firm, he was a member of the Litigation Unit of the Navajo Nation Department of Justice.

Outside of his practice, Mr. Bradley is a member of the board of bar commissioners for the Navajo Nation Bar Association (NNBA). He also regularly teaches courses for the NNBA's bar review course.

Mr. Bradley is a member of the Navajo Nation (Nation) and attended the Sandra Day O'Connor College of Law at Arizona State University (ASU). He is admitted to practice in Arizona, various tribal courts, federal district court, and the 9th Circuit Court of Appeals.



Derrick Burbank

Staff Attorney, Shiprock Judicial District

Derrick is the Staff Attorney for the Shiprock Judicial District of the Navajo Nation. He is licensed to practice in The Navajo Nation and the State of New Mexico. Born and raised in Fort Defiance, Arizona Derrick is Mą'ii Deeshgiizhinii (Coyote Pass People) born for Bit'ahnii (Folded Arms People). He began his legal career in 2005 with DNA-People's Legal Services, Inc. where he served as a

Tribal Court Advocate at DNA's office in Window Rock, Arizona and later served as the Managing Advocate of DNA's office in Shiprock, New Mexico. Derrick received his B.S. in Justice Studies from Arizona State University in 2000 and his J.D. from the Sandra Day O'Connor College of Law at Arizona State University in 2005.



Christopher B. Chaney

Unit Chief - Criminal Justice Information Law Unit, FBI Office of General Counsel

Chris is an enrolled member of the Seneca-Cayuga Nation in Oklahoma.

Bachelor of Arts from the University of Oklahoma (1984). Juris Doctor from Brigham Young University's J. Reuben Clark Law School (1992).

Chris started his legal career in Farmington, New Mexico. He was admitted to the Navajo Nation Bar in 1993. Chris litigated extensively in the Navajo Nation District Courts in Shiprock and Crownpoint and served as a Hearing Officer for the Navajo Nation Housing Authority. In 1997, Chris became an Assistant United States Attorney in Salt Lake City and prosecuted federal crimes from the Utah portion of the Navajo Nation.

Since 2012, Chris has served as the Unit Chief for the Federal Bureau of Investigation (FBI), Office of the General Counsel, Criminal Justice Information Law Unit (CJILU). The CJILU provides legal advice to the FBI's Criminal Justice Information Services (CJIS) Division in Clarksburg, West Virginia which serves 18,000 tribal, federal, state, and local law enforcement agencies.

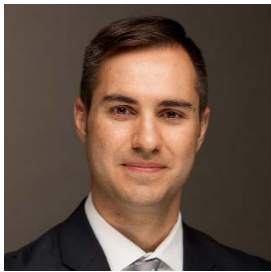
Bar memberships include: Navajo Nation, Utah, New Mexico, and the United States Supreme Court.



Candace French ('17)

Staff Attorney, Navajo Nation Office of Legislative Counsel

Originally from Anadarko, Oklahoma, Candace French is an enrolled member of the Wichita and Affiliated Tribes and is of Navajo, Comanche, and Blackfeet descent. Candace received her B.A. in Political Science, B.A. in American Indian Studies, M.A. in Criminal Justice, and J.D. with a certificate in Indian Law, all from Arizona State University. She was admitted to practice in the State of Arizona in December 2017, is a member of the Indian Law section, and serves as the Area 2 representative for the Young Lawyers Division. She is also admitted to practice law in the Navajo Nation. Candace serves as an attorney at the Navajo Nation Office of Legislative Counsel. She provides legal representation and legislative services to the 24 member Navajo Nation Council, standing committees and other programs within the legislative branch. Candace has more than 10 years of experience working in Native American communities and has dedicated herself and her legal career to serving Indian Country.



Edward J. Hermes ('13)

Associate, Snell & Wilmer

Hermes represents corporate, government and tribal entities in complex commercial disputes in state, tribal and federal courts. He has extensive forensic litigation experience and appellate experience in matters before the Arizona Court of Appeals and Navajo Nation Supreme Court. He advises tribally designated housing entities (TDHE) in compliance issues and policy formation in accord with the Native American Housing and Self Determination Act. Hermes also represents and advises non-tribal corporations conducting business in Indian Country on the laws of native sovereign nations.

Hermes received his J.D. from the Sandra Day O'Connor School of Law at Arizona State University where he was an associate editor for the Arizona State Law Journal. He received a B.S. in Public Policy Advocacy and a B.A. in History from Arizona State University as well. Hermes was ranked as a Rising Star in Southwest Super Lawyers 2018 edition (Native American Law) and the Phoenix Business Journal ranked him in their 20 People to Know in Law (2016).

Prior to joining Snell & Wilmer, Hermes was an attorney for Quarles & Brady where he also completed his summer associate program. He is an active member of the school board for St. Michael Indian School, a board member for Kino Border Initiative and a board member for the Osborn School District Educational Foundation. Hermes is licensed to practice in Arizona and on the Navajo Nation.

**Myles V. Lynk**

Peter Kiewit Foundation Professor of Law, Sandra Day O'Connor College of Law and the Legal Profession Affiliated Faculty in Justice Studies, College of Liberal Arts and Sciences, Arizona State University

A.B., Harvard College (1971)

J.D., Harvard Law School (1976)

Myles Lynk is the Peter Kiewit Foundation Professor of Law and the Legal Profession in Sandra Day O'Connor College of Law at Arizona State University ("ASU"), a faculty fellow of the Center for Law, Science and Innovation and a member of ASU's Academic Council. He teaches legal ethics and professional responsibility, business organizations, corporate governance and civil procedure at the College of Law, and a law and literature seminar for undergraduate Barrett Honors College students. Professor Lynk previously clerked for Judge Damon J. Keith on the U.S. Court of Appeals for the Sixth Circuit, served on the White House Domestic Policy Staff and as a Special Assistant to the U.S. Secretary of Health, Education, and Welfare, and was a partner in the Washington, DC, office of a large multinational law firm.

At ASU, Professor Lynk also serves as a senior honor thesis director for Barrett, The Honors College, undergraduates, and is an affiliated faculty member in Justice and Social Inquiry at the School of Social Transformation of the College of Liberal Arts and Sciences. In 2016-17 Professor Lynk was a Senior Fellow in ASU's Lincoln Center for Applied Ethics and used this opportunity to work on necessary updates to the Navajo Nation Bar Association's Rules of Professional Conduct. In 2014 was a visiting fellow at Magdalene College, Cambridge, and a Visitor in the Faculty of Law at the University of Cambridge, England, where he studied the UK's regulation of its legal profession as compared to evolving regulatory practices in the US. In 2010, Professor Lynk was a Visiting Professor at the Duke University School of Law in Durham, NC.

ASU President Michael Crow appointed Professor Lynk to serve from 2004 to 2010 as ASU's Faculty Athletics Representative to the NCAA and the Pac-10 (now Pac-12) Conference, working with ASU's intercollegiate athletics department on matters involving student-athletes, the NCAA and the Conference. In 2005, President Crow appointed Professor Lynk to conduct the university's investigation into safety and accountability issues arising from the off-campus fatal shooting of one student by another student. The "Lynk Report" which resulted from the investigation led to significant improvements in safety measures at ASU.

In his national public service Professor Lynk applies his expertise and expands his experience in legal ethics through his service as Chair of the American Bar Association's ("ABA's") Standing Committee on Ethics and Professional Responsibility (2014-2017) and of the ABA's Standing Committee on Professional Discipline (2010-2013). Professor Lynk's work in bioethics has been enhanced through his prior service as: Chair of the ABA's Special Committee on Bioethics and the Law, a member of the National Advisory Commission on Addiction Treatment of the National Center on Addiction and Substance Abuse at Columbia University, and a member of the Phoenix Area Institutional Review Board of the U.S. Indian Health Service. His expertise in civil procedure was recognized when he was appointed by Chief Justice William Rehnquist to two terms on the Civil Rules Advisory Committee of the Judicial Conference of the United States. Professor Lynk's teaching in business law and corporate governance is informed by his participation in the Transatlantic Corporate Governance Dialogue, his leadership roles in the ABA's Section of Business Law and his corporate work in private practice.

**Nicholas H. Mattison**

Attorney, Feferman, Warren & Mattison

Nicholas Mattison is a partner at Feferman, Warren & Mattison. His practice includes individual cases and class actions against fraudulent car dealers, predatory lenders, abusive debt collectors, and other businesses that rip off consumers. Mr. Mattison has won judgments for his clients at trial and in arbitration. In 2017, he won a \$7.3 million judgment against a payday lender. In 2016, he won a \$10 million dollar verdict against an abusive debt collector. Mr. Mattison is a 2008 graduate of Harvard Law School. Prior to joining the firm, Mr. Mattison clerked for the Honorable Edward L. Chavez on the New Mexico Supreme Court, and worked for four years in the Window Rock office of DNA-People's Legal Services, where he fought for the rights of members of the Navajo Nation.

Robert Yazzie

Chief Justice Emeritus of the Navajo Nation Supreme Court

The Honorable Robert Yazzie is a retired chief Justice of the Navajo Nation. He was the Chief Justice of the Navajo Nation from 1992 through 2003. He practiced law in the Navajo Nation for 16 years, and he was a district judge for eight years. He has a Bachelor of Arts degree from Oberlin College of Ohio and a juris doctor degree from the University of New Mexico School of Law. He is now teaching Navajo Law at the Navajo Technical University. He was the Director of *Diné*Policy Institute of *Diné* College (Navajo Nation), developing policy using authentic Navajo thinking.

He is a member of the Navajo Nation Bar Association. He is the author of articles and book chapters on many subjects, including Navajo peacemaking, traditional Indian law, and international human rights law. He is a visiting professor at the University of New Mexico School of Law, an adjunct professor of the Department of Criminal Justice of Northern Arizona University and a visiting member of the faculty of the National Judicial College. He recently taught Navajo law at the Crownpoint Institute of Technology. Chief Justice Yazzie continues a career devoted to education in formal participation in faculties, lectures and discussions of traditional indigenous law at various venues throughout the world. He has a global audience and he has frequently visited foreign lands to share his wisdom about traditional indigenous justice and governance.

Navajo Nation Law CLE

Section 2

Update on Navajo Nation Law
Navajo Nation Court Update
(Derrick Burbank)

Navajo Nation Case Law Update

2018 Navajo Nation Law CLE Conference

Derrick Burbank
Staff Attorney, Shiprock Judicial District
Navajo Nation Judicial Branch

Kathleen Arviso v. Norma Muskett

No. SC-CV-18-17

- Decided by the Navajo Supreme Court on April 5, 2017.
- The case deals with candidate qualifications under Navajo law and the laws governing pre- and post-election challenges.
- On appeal, the issues before the Court:
 - Whether Ms. Arviso's post-election challenge was timely filed under 11 N.N.C. § 341(A)(1) when Ms. Arviso was aware of Ms. Muskett's employment before the election; and
 - Whether OHA erred in disqualifying Ms. Muskett and voiding her election.

Kathleen Arviso v. Norma Muskett

No. SC-CV-18-17

- Holding: The Supreme Court reversed OHA's decision to disqualify Ms. Muskett and void her election.
- The Court determined OHA erred in its decision by failing to address Ms. Arviso's knowledge of Ms. Muskett's employment which would have triggered a 10-day deadline under statute for Ms. Arviso to file her challenge.
- The Court also determined OHA erred in its decision by relying on case law (*Becenti-Aguilar*) that was distinguished on its facts.

Earl Apachito v. Navajo Election Administration

No. SC-CV-32-17

- Decided by the Navajo Supreme Court on July 14, 2017.
- This case involves an appeal from an OHA decision dismissing a complaint filed by Mr. Apachito because the complaint was signed by Mr. Apachito's legal counsel on his behalf.
- Issue on Appeal: Whether an OHA complaint has to be verified by the complaining party themselves or whether the complaining party's attorney can verify the complaint to initiate an action under the Election Code.

Earl Apachito v. Navajo Election Administration

No. SC-CV-32-17

-
- Holding: The Court reversed OHA's decision, determining that a complaint can be verified by a complaining party's attorney as an incidental act of representing their client, pursuant to a person's right to hire counsel at their own expense under the Navajo Nation Bill of Rights and the Election Code.
 - The Court rejected OHA's interpretation that the Election Code only permits legal counsel to represent a party at the hearing stage of a case, and not before.
 - The Court remanded the case for reinstatement of Mr. Apachito's grievance and a hearing on the merits.

Northern Edge Casino & The Navajo Nation v. Window Rock District Court

No. SC-CV-67-16

-
- Decided by the Navajo Supreme Court on July 31, 2017.
 - This case concerns a personal injury matter and a writ action filed against the Window Rock District Court upon the court's denial of Petitioners' motion to dismiss.
 - Issue on Appeal: Whether an action against the Navajo Nation under the Navajo Sovereign Immunity Act commences with service of a notice of suit, or with the filing of a complaint with the district court.

Northern Edge Casino & The Navajo Nation v.
Window Rock District Court
No. SC-CV-67-16

- Holding: Upon review of the statute's plain language, and upon review of the legislative history of the Act, the Court held that an action against the Navajo Nation commences with the filing of a complaint.
- The Court rejected the district court's ruling that "filing" a notice of suit commences an action because there is no such thing as "filing" a notice of suit; that the district court has no authority over such correspondence in the pre-litigation phase.
- The Court determined Ms. Johnson failed to file a complaint commencing her action by March 1, 2015 and thus, failed to comply with 1 N.N.C. § 555(A).
- The Court also referenced language used in Ms. Johnson's notice of suit to support its determination.

Northern Edge Casino & The Navajo Nation v.
Window Rock District Court
No. SC-CV-67-16

- The Court also made a determination that Ms. Johnson failed to comply with 1 N.N.C. § 555(A)(2), which requires the notice of suit to identify of each prospective defendant.
- Petitioners sought a writ of mandamus, however the Court found good cause to issue a writ of prohibition instead, pursuant to the holding in *Atcitty v. District Court for the Judicial District of Window Rock*, 8 Nav. R. 227, 229 (Nav. Sup. Ct. 1996) (citing *Watts v. Sloan*, 7 Nav. R. 185 (Nav. Sup. Ct. 1995)) and upon the district court's delay in determining jurisdiction.

Terlyn Sherlock v. The Navajo Election Administration

No. SC-CV-64-17

- Decided by the Navajo Supreme Court on December 26, 2017.
- This case involves OHA's decision to overturn the removal of an elected school board member (Ms. Sherlock) upon a finding that her State misdemeanor convictions were set-aside after she assumed office, therefore there were no convictions that would have otherwise disqualified her.

Terlyn Sherlock v. The Navajo Election Administration

No. SC-CV-64-17

Issues on Appeal:

- Whether the set aside of Ms. Sherlock's prior convictions by the state of Arizona, while Ms. Sherlock was in office, absolved her of having to disclose any convictions that would have otherwise disqualified her from office; and
- Whether Ms. Sherlock's negative response to the inquiry about felony and misdemeanor convictions on her candidate application was a false statement under the Election Code so as to justify her removal from office.

Terlyn Sherlock v. The Navajo Election Administration

No. SC-CV-64-17

- Holding: The Court found jurisdiction over this case pursuant to 11 N.N.C. § 8(D)(4)(j) (2005) and its holding in *Sandoval v. NEA*, No. SC-CV-62-12 (Nav. Sup. Ct. February 26, 2013).
- The Court determined Ms. Sherlock's response of "N/A" on her candidate application was a false statement pursuant to the Navajo Election Code.
- The Court determined OHA erred in its decision by relying on case law, *Martine-Alonzo v. Jose*, No. SC-CV-37-17 (Nav. Sup. Ct. November 3, 2016), that was distinguished on its facts.
- The Court determined 11 N.N.C. § 8(D)(4)(j) supplants the "*Haskie* rule" pursuant to *Sandoval*.
- The Court reviewed the role of a candidate and their duties as a *naat'anii*.
- The Court reversed OHA's order and allowed the NEA to proceed with its removal of Ms. Sherlock pursuant to 11 N.N.C. § 240(D).

Austin C. Bahe v. Navajo Nation Labor Commission

No. SC-CV-15-18

- Decided by the Navajo Supreme Court on June 29, 2018.
- This case involves a petition for a writ of mandamus filed by Mr. Bahe against the Labor Commission on the grounds that the Commission failed to timely adjudicate his complaint under Navajo law.
- Issue on Appeal: Whether a writ of mandamus should be granted to compel the Labor Commission to hear Mr. Bahe's complaint, despite three vacancies on the Commission.

Austin C. Bahe v. Navajo Nation Labor Commission

No. SC-CV-15-18

- Holding: The Court granted Mr. Bahe's petition and issued a permanent writ of mandamus against the Labor Commission pursuant to 7 N.N.C. § 303(C) and *Yellowhorse, Inc. v. Window Rock Dist. Ct.*, 5 Nav. R. 85, 87 (Nav. Sup. Ct. 1986).
- The Court determined the Labor Commission's actions violated Mr. Bahe's due process rights and did not meet the Commission's fiduciary duty to the Navajo people.
- Despite the vacancies, the Court determined the Labor Commission has the necessary members to convene and hear Mr. Bahe's complaint pursuant to the NPEA's hold-over provision at 15 N.N.C. § 303(D).

Vincent Harris Yazzie v. Joe Shirley, Jr.

No. SC-CV-41-18

- This case involves an appeal from an OHA decision dismissing Mr. Yazzie's Statement of Grievance challenging Joe Shirley Jr.'s right to run for the Office of Navajo Nation President for a third term.
- A central issue on appeal is the two-year term limit set by 2 N.N.C. § 1002(D) on the Office of Navajo Nation President.
- The Court heard oral argument on October 4, 2018.
- The Court upheld OHA's dismissal of Mr. Yazzie's grievance.



www.navajocourts.org

No. SC-CV-18-17

NAVAJO NATION SUPREME COURT

Kathleen Arviso,
Petitioner/Appellee,

v.

Norma Muskett,
Respondent/Appellant.

OPINION

Before SLOAN, A., Chief Justice, and SHIRLEY, E., Associate Justice.

Appeal from a decision of the Office of Hearings and Appeals concerning Cause No. OHA-NEA-003-17, Chief Hearing Officer Richie Nez, presiding.

Bernadine Martin, Gallup, New Mexico, for Appellant; Justin Jones, Farmington, New Mexico, for Appellee.

Appellant was elected to a fifth term as Chapter Secretary/Treasurer. Upon a post-election challenge, OHA disqualified Appellant and voided her election finding she was not qualified as a candidate at the filing of her application because, as an employee of BIA, she did not submit a written clearance of no conflict from her employer as required by 11 N.N.C. § 8(C)(11). We reverse OHA for the reasons that follow.

I

On November 8, 2016 Appellant Norma Muskett (Muskett) was re-elected as Chapter Secretary/Treasurer for Chichiltah Chapter. Muskett served as Chapter Secretary/Treasurer for the past four (4) terms. On November 9, 2016 her opponent, Appellee Kathleen Arviso (Arviso), filed a Statement of Grievance under 11 N.N.C. § 341 stating she was informed Muskett did not comply with 11 N.N.C. § 8(C)(11), which required a candidate employed by the Bureau of Indian Affairs (BIA) or Indian Health Service (IHS) to obtain a written clearance of no conflict

from their employer in the event that candidate is elected. Arviso did not provide any other information as to who informed her or when she was informed that Musket did not file a written clearance. Arviso, however, identified two individuals, Arlene Tso-Coan and Tommy Nelson, as persons with knowledge of the facts surrounding the grievance. Arviso also stated “*if* Candidate Musket has not filed a grievance, I reserve my right to challenge the issue of conflict[.]” *see* Statement of Grievance, p. 2, R. at 1 (emphasis added), noting her uncertainty of alleged facts.

The Office of Hearings and Appeals (OHA) accepted the grievance and held an evidentiary hearing on January 30, 2017. Both parties appeared with legal counsel. In a written decision later issued on March 7, 2017, OHA disqualified Muskett and voided her election as Chapter Secretary/Treasurer.¹ In support of its decision, OHA found Muskett is employed with BIA as a Home Living Assistant and, as an employee of BIA, Muskett did not submit a written clearance to the Navajo Election Administration (NEA) prior to the filing of her candidacy application. OHA also found that Muskett obtained a written clearance from BIA on November 21, 2016. This appeal followed.

II

The issues are whether this post-election challenge was timely filed under 11 N.N.C. § 341(A)(1) when the complainant was aware of her opposing candidate’s employment with BIA before the election and whether OHA erred in disqualifying Muskett and voiding her election.

III

The Court reviews decisions of the Office of Hearings and Appeals under a sufficiency of the evidence standard. *In re Grievance of Wagner*, No. SC-CV-01-07, slip op, at 3 (Nav. Sup. Ct.

¹ OHA delayed setting a hearing and rendering a written decision despite its non-discretionary duty to conduct a hearing within 15 days of the complaint not being dismissed and to issue a written determination within 10 days of the hearing. *See* 11 N.N.C. § 341(A)(1) (2005).

May 14, 2007). A decision lacks sufficient evidence if OHA misinterpreted the law. *Id.* The Supreme Court can reverse OHA's decision if OHA's legal interpretation is incorrect. *Id.*

IV

The Election Codes sets out qualifications for Chapter Officers, which includes among other things, that

If a candidate is an employee of the Bureau of Indian Affairs or the Indian Health Services, prior to filing, the candidate shall obtain written clearance from the BIA or IHS stating that there is no conflict of interest for the candidate in the event the candidate is elected as Chapter officer. Clearance shall be provided to Election Administration Office.

11 N.N.C. § 8(C)(11) (2005). "Within 30 days of receipt of the application, the Election Administration shall review, verify and determine, on the face of the candidate application, the qualifications for candidacy." 11 N.N.C. § 23(A) (2005). "The Navajo Election Administration shall have the authority to determine ineligible any individual who does not meet the qualifications for the office sought." *Id.* Here, NEA did not determine Muskett to be ineligible. Instead, NEA certified Muskett as a candidate for Chapter Secretary/Treasurer and notified other candidates of Muskett's certification. There was no challenge to Muskett's certification by opposing candidates, including Arviso, prior to the primary or general elections.

On appeal, Muskett relies on NEA's certification of her application. Muskett asserts she is a qualified candidate for Chapter Secretary/Treasurer in this election, like in the four previous elections in which she prevailed. Specifically, Muskett explains she has been employed with BIA for over twenty-one (21) years (as determined by OHA) and has held the position of Chapter Secretary/Treasurer for the past 16 years having complied with the Election Code. Muskett also offers that on November 21, 2016 she obtained two written clearances of no conflict from her employer, substantiating that she continues to be qualified. Muskett also asserts Arviso's post-

election challenge should be barred because her employment with BIA was known to Arviso prior to the primary and general elections, or in July, 2016, requiring Arviso to file a complaint within 10 days of this incident rather than filing until after the general election. Furthermore, Muskett argues that OHA's reliance on *Becenti-Aguilar v. Begay*, No. SC-CV-51-16 (Nav. Sup. Ct. December 16, 2016), in overturning the outcome of her election is a misapplication of the law.

Asserting a timely challenge under the Navajo Election Code is critical. Most recently in *Becenti-Aguilar v. Begay*, No. SC-CV-51-16 (Nav. Sup. Ct. December 16, 2016), we stated "the treatment of an election challenge depends on whether it was filed pre or post-election." *Id.*, slip op. at 6. Looking to *Haskie v. Navajo Board of Elections*, 6 Nav. R. 336 (Nav. Sup. Ct. 1991), we stated "election statutes are mandatory when enforcement is sought *prior* to an election, but they are read to be directory only when challenges are raised *after* an election." *Id.* (citing *Haskie*, 6 Nav. R. at 338 (internal citation omitted)). This rule of statutory construction is built on the premise "that elections which have already been held were conducted regularly and validly." *Haskie*, 6 Nav. R. at 338. We also noted that post-election challenges are viewed with disapproval when the challenge concerns procedures that are known to the challenger before the election, but are raised only after the people have duly voted and the challenger has lost the election. *Becenti-Aguilar*, slip op. at 7.

Generally, candidate qualification challenges are most appropriately raised pre-election under 11 N.N.C. § 24 (2005). Certain post-election challenges have been permitted under 11 N.N.C. § 341(A)(1). *Gishie v. Begay*, 7 Nav. R. 377, 380 (Nav. Sup. Ct. 1999) (post-election challenge of candidate qualification permitted when candidate had almost exclusive knowledge of the facts to which he made declarations); *Tsosie v. Deschene*, Nos. SC-CV-57-14 and SC-CV-

58-14, slip op. at 7 (Nav. Sup. Ct. October 8, 2014) (post-election challenge of candidate qualification permitted when candidate had almost exclusive knowledge of the facts as to his qualifications); and *Becenti-Aguilar v. Begay*, No. SC-CV-51-16, slip op. at 7 (Nav. Sup. Ct. December 16, 2016) (post-election challenge of candidate qualification permitted when an unlawful stipulation allowing an unqualified candidate to run was not known to other candidates to allow a pre-election challenge).

Under 11 N.N.C. § 341(A)(1), the Election Code requires “[w]ithin 10 days of the incident complained of or the election, the complaining person must file with the Office of Hearings and Appeals a written complaint setting forth the reasons why he or she believes the Election Code has not been complied with.” This Court has accepted “this statute to mean that if a candidate knows of an Election Code violation before an election, he or she must take action within ten days of such an incident rather than do so after the election.” *Haskie*, 6 Nav. R. at 339. Here, OHA summarily concluded that Arviso filed a complaint one day after the general election and thereby met the requirement of 11 N.N.C. § 341(A)(1) for the matter to be heard. Even with testimony that Arviso knew of Muskett’s employment with BIA since July, 2016, OHA did not address that part of 11 N.N.C. § 341(A)(1) requiring the complaining party to assert a challenge within 10 days of the incident complained of. OHA simply omitted this fact from its final order.

“[T]he complainant shall have the burden of proving the allegations contained in the statement of dispute by clear and convincing evidence.” 11 N.N.C. § 341(A)(2). Based on the audio, Arviso did not call upon the two people she named as witnesses, nor did she call upon any NEA official to prove that a written clearance was not provided to NEA. Instead, OHA allowed Arviso to call upon Muskett, who then carried the burden of proof that she did not violate the Election Code. The fact is NEA certified Musket as a candidate. Perhaps a previously obtained

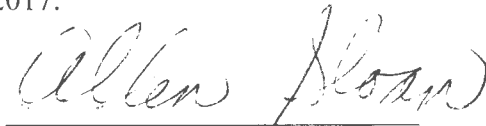
written clearance submitted during prior elections was sufficient. Nonetheless, NEA has been authorized some discretion as to the acceptance of the written consent under 11 N.N.C. § 8(C)(11). Absent any findings otherwise, we thus assume NEA acted within the boundaries of its discretion in certifying Muskett.

Relying on *Becenti-Aguilar*, OHA stated that qualifications set forth in the Election Code are mandatory in themselves and the Election Code does not authorize OHA to allow a candidate to run for public office when that individual is determined not qualified for the position sought. *Id.*, slip op. at 6. The *Becenti-Aguilar* case is distinguishable from this case because it concerned an unqualified candidate who was permitted to run for Council Delegate through an undisclosed stipulated agreement that waived a mandatory qualification for that particular candidate, thwarting any possible pre-election challenge. The statutory qualification was therefore read as mandatory. Here, Arviso had an opportunity to take raise her complaint prior to the election requiring 11 N.N.C. § 8(C)(11) to be read as mandatory. Arviso, however, did not initiate a pre-election challenge despite her knowledge of Muskett's employment with BIA since July, 2016. Under the facts of this case, the requirement of 11 N.N.C. § 8(C)(11) must therefore be read as directory. *See Haskie*, 6 Nav. R. at 338 (citing *Johnson*, 4 Nav. R. at 81). Accordingly, the requirement to submit a written clearance will not disqualify a candidate who is otherwise qualified under the statute. Muskett obtained a written clearance of no conflict from BIA on November 21, 2016 that confirmed, or re-confirmed in this case, she had no conflict as a candidate for Chapter Secretary/Treasurer. We thus decline to set aside the presumption of a validly conducted election.

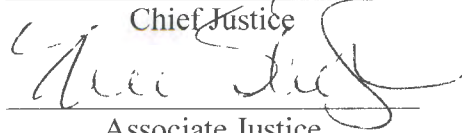
V

We hereby reverse the decision of the OHA.

Dated this 5th day of April, 2017.



Chief Justice



Associate Justice

NAVAJO NATION SUPREME COURT

Earl Apachito,
Appellant,

v.

Navajo Election Administration,
Appellee.

OPINION

Before SLOAN, A., Chief Justice, and SHIRLEY, E., Associate Justice.

David R. Jordan, Gallup, New Mexico, for Appellant; Levon Henry and Ron Haven, Window Rock, Navajo Nation, for Appellee.

Appeal from a decision of the Office of Hearings and Appeals concerning Cause No. OHA-NEA-014-17, Hearing Officer Richie Nez, presiding.

Appellant through counsel filed a complaint contesting his disqualification as a sitting school board member. The complaint was dismissed because appellant's counsel signed the complaint on behalf of his client. We reverse.

I

On May 8, 2017 Appellant Earl Apachito (Apachito) filed a complaint against Navajo Election Administration (NEA) in the Office of Hearings and Appeals (OHA). The complaint alleged that NEA wrongfully disqualified him from his position as a member of the Alamo Navajo School Board. A hearing was held on the complaint in Alamo, New Mexico. On June 22, 2017, upon NEA's motion, OHA dismissed the complaint because "[the complaint] was signed, not by Earl Apachito but by David R. Jordan, *Esq.* who represented him." *Order of Dismissal Without Prejudice*, at 1 (OHA June 22, 2017) (emphasis in original).

In its ruling, OHA stated “[t]he Navajo Election Code is clear that the ‘registered voter’ is the complainant. It also recognizes the role that legal counsel plays in the process of his/her Grievance. Legal counsel at the hearing stage represents the complainant; not before.” *Id.* at 2. OHA also stated “[t]he appeal ‘shall’ be made by the aggrieved candidate.” *Id.* As a result, OHA found “[i]n this case, legal counsel is not the ‘registered voter’ and not the complainant which case law recognizes.” Thus, OHA concluded “legal counsel has no standing to register this complaint.” *Id.* Apachito appeals OHA’s dismissal.

II

The issue is whether an Office of Hearings and Appeals complaint had to be verified by the complaining party or whether the complaining party’s attorney could verify the complaint to initiate an action under the Election Code.

III

When addressing the legal interpretation of administrative bodies, this Court applies a *de novo* standard of review.” *Sandoval v. Navajo Election Administration*, No. SC-CV-62-12, slip op. at 4 (Nav. Sup. Ct. February 26, 2013). The Court therefore has the authority to examine the underlying legal interpretation, and can reverse an OHA decision if the law OHA relies on is not valid. *Id.* at 3-4.

IV

Apachito contends OHA abused its discretion when it dismissed his complaint because his attorney signed the certification portion of the complaint on his behalf. NEA, on the other hand, asserts OHA properly dismissed the complaint because Apachito did not write and sign the statement himself. NEA asserts OHA’s complaint form (a.k.a. OHA’s “Statement of Grievance”) “clearly requires the person filing must be a registered voter of the Navajo Nation and that the

registered voter is the one complaining.” *Brief of the Navajo Election Administration*, at 6. Although NEA acknowledges attorneys “speak for” clients, it argues the attorney/client relationship must be shown before the complaint is considered sufficient on its face to be heard.

First, this is not a typical appeal concerning a disqualification of a candidate. This is an appeal concerning a disqualification of an elected official for his failure to maintain the qualifications of his public office under the newly amended provisions of the Election Code. *See* Resolution No. CJA-02-14 (amending 11 N.N.C. §§ 8, 21 and 240) (signed into law on February 11, 2014). Thus, precedent with regard to “candidates” may not necessarily apply.

With that said, we consider the issue on appeal.

The Election Code provides “[w]ithin 10 days of the incident complained of or the election, the complaining person must file with the Office of Hearings and Appeals a written complaint setting forth the reasons why he or she believes the Election Codes has not been complied with.” 11 N.N.C. § 341(A)(1) (2005). The Election Code is silent on verification of the complaint requirements now on appeal.

The fill-in-the-blank complaint form used by OHA that includes a certification section that states:

I, [the complaining party], a registered voter of the Navajo Nation hereby am contesting the event(s) which took place due to reason(s) stated and further I swear or affirm that person(s) listed as witnesses are aware they are listed as such to the best of my knowledge and belief the Statement of Grievance is true and correct.”

OHA’s Statement of Grievance, R. at 1. Pursuant to OHA’s authority to promulgate rules, NEA insists this form requires that the complaining party to verify the complaint himself or herself. OHA in its ruling and NEA in its brief, however, do not cite to a particular rule that supports that proposition. Nonetheless, as mentioned above, the Election Code is silent on verification requirements.

Under the Navajo Nation Bill of Rights, “no party to a civil action at law . . . shall be denied . . . the right to have the assistance of counsel, at their own expense” 1 N.N.C. § 7. Furthermore, no provision of the Navajo Nation Bill of Rights shall be abridged or deleted by amendment or otherwise, except by public referendum. 1 N.N.C. § 1 (2005). “This right is also guaranteed by the Navajo common law.” *Navajo Nation v. MacDonald, Sr.*, 6 Nav. R. 432, 436 (Nav. Sup. Ct. 1991). The person facing allegations has the right to have someone speak for him. *Id.* (citing *Boos v. Yazzie*, 6 Nav. R. 211, 214 (Nav. Sup. Ct. 1990). “This Navajo cultural standard [of having someone else speak for you] is stricter than that required by the Indian Civil Rights Act[.]” *Id.*

In amending the Election Code to enforce qualifications of elected officials, the Navajo Nation Council recognized the importance of due process in proceedings before OHA. “Due process, including right to counsel, is afforded at these administrative hearings.” Resolution No. CJA-02-14, Findings, ¶2 (citing Rule 2, Rules for Administrative Hearing under the Election Code) (requires only that counsel be licensed and in good standing). The Council said:

Although section 240 of the Election Code states the offenses for which the Council can remove officials (at least those listed thereunder), the section does not specify the procedural steps. The section also does not address hearing procedures and due process, such as notice requirements and *the right to legal counsel*.

Resolution No. CJA-02-14, Findings, ¶6 (emphasis added). In its efforts to make uniform the process of removal, like the one before us, the Navajo Nation Council intended to ensure one’s right to counsel at their own expense, expressing no limitations in one’s assistance by counsel. Although most complaints are filed by the complaining party before counsel is retained, a complaining party, like Apachito, should not be punished for retaining counsel to assist in the

filing of a complaint. We thus reject OHA's interpretation that the Election Code permits counsel to represent the complainant at the hearing stage and not before.

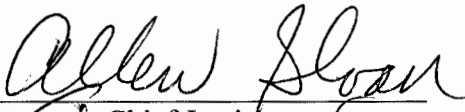
Because the right to counsel at one's own expense is a fundamental right, a holding that only a complaining party may verify a complaint by signing and filing the OHA complaint would not be in accordance with due process and fundamental fairness expected of Navajo tribunals. An attorney is bound by ethical and legal standards in the representation of his or her clients and subject to sanctions thereof. Accordingly, an attorney's signature on a complaint attests to the good faith of the allegations. We thus hold an OHA complaint can be verified by the complaining party's attorney as an incidental act to representing a client.

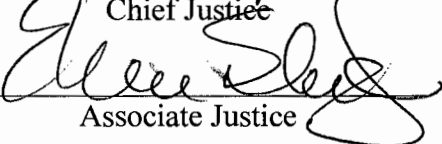
In the case at hand, Apachito secured the services of an attorney to assist him in filing his complaint. Apachito's attorney signed his own name "for Earl Apachito" to the complaint attesting to the alleged violations of the Election Code. We find the complaint sufficient on its face for purposes of a hearing on merits of the complaint.

IV

Based on the foregoing, we hereby REVERSE the Office of Hearings and Appeals and REMAND the case for reinstate of the grievance and a hearing on the merits.

Dated this 4th day of July, 2017.



Chief Justice


Associate Justice

No. SC-CV-67-16

SUPREME COURT OF THE NAVAJO NATION

Northern Edge Casino and The Navajo Nation,
Petitioners,

v.

Window Rock District Court,
Respondent,

and Concerning:

Irene Johnson,
Real Party in Interest.

OPINION

Before SLOAN, A., Chief Justice, SHIRLEY, E., Associate Justice, and BEGAY, M., Associate Justice by Designation.

An appeal from a decision of the Window Rock District Court concerning Cause No. WR-CV-56-15, the Honorable Carol Perry, presiding.

Joshua M. Montagnini, Gallup, New Mexico, for Petitioners; Robyn Neswood-Etsitty, Window Rock, Navajo Nation, for Respondent; Daniel P. Abeyta, Farmington, New Mexico, for Real Party in Interest.

This case concerns the filing of a complaint against the Navajo Nation under the Navajo Sovereign Immunity Act. Clarification of 1 N.N.C. § 555(A)(3) is provided.

I

The undisputed facts are: on March 1, 2013, Real Party in Interest Irene Johnson (Johnson) was allegedly injured on the premises of the Northern Edge Navajo Casino. From February 19-20, 2015, Johnson served notices of suit upon the Navajo Nation President, Attorney General, and the Chief Legislative Counsel. Thereafter, on March 27, 2015, Johnson filed a Complaint for Damages in the Window Rock District Court. On June 4, 2015, Petitioners Northern Edge Navajo Casino

and the Navajo Nation (collectively “the Nation”) moved for dismissal under Rule 12(b)(6) of the Navajo Rules of Civil Procedure arguing that the complaint was filed after the statute of limitations for personal injuries expired on March 1, 2015. On July 6, 2016, the district court denied the Nation’s request to dismiss stating, “that filing a notice of intent to sue within the two year prescribed statute of limitations is timely because it constitutes ‘commencement’ of an action.” Order Denying Defendants’ Motion to Dismiss at 2, Petitioners’ Ex. D.

In response, on November 15, 2016, the Nation filed a Petition for Writ of Mandamus against the Window Rock District Court (Respondent) asserting the district court was required by 1 N.N.C. § 555(A) to dismiss the complaint for lack of jurisdiction because the commencement of an action starts with the filing of a complaint, not with the service of a notice of suit. On February 23, 2017, this Court issued an Alternative Writ ordering Respondent to file a response. On March 1, 2017, Respondent filed a Response to Petitioners’ Petition for Writ of Mandamus asserting that it did not err in denying Petitioners’ motion to dismiss because equitable tolling applied, and Johnson did, in fact, make a timely filing. Equitable tolling, however, was not mentioned at all in the district court’s order. Nonetheless, Respondent argues that because the Navajo Sovereign Immunity Act is silent on whether compliance with the 30-day notice requirement tolls the statute of limitations, it properly found the doctrine of equitable tolling applied under principles of fairness and substantial justice pursuant to *Yazzie v. Tooh Dineh Industries*, No. SC-CV-67-05 (Nav. Sup. Ct. September 20, 2006).

On March 13, 2017, Johnson also filed a Response to Petitioner’s Petition for Writ of Mandamus arguing that she filed a proper notice of suit within the statute of limitations. Johnson argues that, although there is no case law directly on point, her timely filed notice of suit equitably tolled the statute of limitations for at least 30 days. Johnson further argues the Navajo Sovereign

Immunity Act was not intended to effectively shorten the applicable statute of limitations for claimants who file a notice within 30 days of the expiration of the statute of limitations. Furthermore, Johnson argues a permanent writ would violate *Diné Bi Beenahaz'áanii* and *K'e* because she and others similarly situated would be denied the right to file suit though a notice of suit was filed within the statute of limitations.

A hearing was held at Twin Arrows on June 9, 2017. At the hearing, Respondent abandoned its written arguments. Respondent now argues that the Nation has a plain, speedy, and adequate remedy at law through an appeal; that the Nation asserts an affirmative defense of statute of limitations that is subject to a discretionary rather than a mandatory ruling; and that the statute of limitations argument as an affirmative defense cannot be raised by a court, including this Court. Having thoroughly considered the petition and arguments, this decision now follows.

II

The issue in this case is 1) whether an action against the Navajo Nation under the Navajo Sovereign Immunity Act commences with service of a notice of suit or with the filing of a complaint.

III

The notice requirements of the Navajo Sovereign Immunity Act are jurisdictional and whether a plaintiff complied with them is a question of law. *Chapo v. Navajo Nation*, 8 Nav. R. 447, 456 (Nav. Sup. Ct. 2004). We review questions of law *de novo*, giving no deference to the district court's decision. *Id.*

IV

"The right of the Navajo Nation to assert a defense of sovereign immunity whenever it is sued is beyond question." *Johnson v. Navajo Nation*, 5 Nav. R. 192, 195 (Nav. Sup. Ct. 1987).

“The Navajo Nation is a sovereign nation which is immune from suit.” 1 N.N.C. § 553(A) (2005).

“Sovereign immunity is an inherent attribute of the Navajo Nation as a sovereign nation and is neither judicially created by any court, including the Courts of the Navajo Nation, nor derived from nor bestowed upon the Navajo Nation Council as the governing body of the Navajo Nation.” 1 N.N.C. § 553(B) (2005).

The Navajo Nation codified its inherent authority in the Navajo Sovereign Immunity Act and set forth specific and express conditions under which immunity is waived and the Navajo Nation can be sued. *Barber v. Navajo Housing Authority*, No. SC-CV-28-12, slip op. at 7 (Nav. Sup. Ct. June 12, 2014).

The Navajo Sovereign Immunity Act provides:

Any person or party desiring to institute suit against the Navajo Nation or any officer, employee or agent of the Navajo Nation as authorized by this Subchapter shall, as a *jurisdictional condition precedent* provide notice to the President of the Navajo Nation, the Chief Legislative Counsel, and the Attorney General of the Navajo Nation, and the Chief Legislative Counsel, as provided herein.

1 N.N.C. § 555(A) (Resolution No. CJA-06-10, February 13, 2010) (emphasis added). As a “jurisdictional condition precedent,” the notice requirements at 1 N.N.C. § 555(A) are jurisdictional. *E.g., Chapo v. Navajo Nation*, 8 Nav. R. 447, 456 (Nav. Sup. Ct. 2004).

The issue on appeal concerns that part of the notice requirements that reads:

No action shall be accepted for filing against the Navajo Nation or any officer, employee or agent of the Navajo Nation unless the plaintiff has filed proof of compliance with this Subchapter at least 30 days prior to the date on which the complaint or any other action is proposed to be filed with such Court.

1 N.N.C. § 555(A)(3) (2005).

“In matters involving statutory interpretation, we initially look to the language of the statute and attempt to decipher a meaning from the words it uses.” *PC&M Construction Co. v. Navajo Nation*, 7 Nav. R. 58, 59 (Nav. Sup. Ct. 1993). “If the meaning is not apparent on the face

of the statute, then resort to other indicia, such as legislative history, is appropriate.” *Id.* “The courts shall also utilize Diné bi beenahaz’áanii whenever Navajo Nation statutes or regulations are silent on matters in dispute before the courts.” 7 N.N.C. § 204(A) (2005).

Fortunately, when the Navajo Sovereign Immunity Act was being amended in 1993 to clarify the procedure for suits against the Navajo Nation, a legislative record from the July 25, 1993 council session was prepared. In that session, the attorney for the Navajo Nation stated “[i]t has been the experience of the Navajo Nation with regards to these actions that have been filed[,] [t]he procedures that are spelled out were too general or were being misunderstood by people who were filing actions against the Navajo Nation.” Record of the Navajo Tribal Council, at 934 (July 25, 1993) (discussion of Tribal Council Resolution No. CJY-55-85). As a result, “there would be a notice of claim filed pursuant to the present act . . . [a]nd after the 30 days of the notice, without filing a complaint in the court[,] there would be --- people judging against the Navajo Nation.” *Id.* To avoid what was referred to in the legislative record as a “notice of default” against the Nation with no complaint ever being filed, a distinction between a notice of suit and a complaint was intended. Furthermore, amendments were intended “so that people will be on notice, people who are filing actions against the Navajo Nation. They will be on notice that their action really doesn’t begin until they have a complaint with the court and a summons is issued to the Attorney General and the Chairman of the Navajo Tribal Council.” *Id.*

The legislative clarification that the commencement of an action begins with the filing of a complaint is in accord with Rule 3 of the Navajo Rules of Civil Procedure, which states “[a] civil action is begun by filing a complaint with the court.” We, therefore, reject the district court’s ruling that “filing” a notice of suit commences an action. There is no “filing” of a notice of suit. At the “service” of a notice of suit, the district court has no authority over such correspondence in the

pre-litigation phase. We, thus, hold that an action against the Navajo Nation commences with the filing of a complaint.

Despite Johnson's arguments that an action commences with a notice of suit, we believe Johnson understood otherwise. Johnson's notice of suit to the Nation stated "We are eager to resolve this dispute and welcome the Navajo Nation to discuss resolution of this matter *prior to the filing of a lawsuit*, however, my client has authorized suit if negotiations are unsuccessful." Notice of Suit at 4, Petitioner's Ex. B (emphasis added). "Prior to filing of a lawsuit" clearly demonstrates that Johnson knew the commencement of a suit or action begins with the filing of a complaint in the district court.

Although the Window Rock District Court launches a new argument at the hearing that the statute of limitations for civil actions at 7 N.N.C. § 602(A) is an affirmative defense that cannot be raised by the court, including the Supreme Court, we disagree in suits against the Nation. "Sovereign immunity is jurisdictional, therefore the Navajo Nation's defense of sovereign immunity automatically raises questions concerning the district court's jurisdiction over the Navajo Nation." *Johnson*, 5 Nav. R. at 195. Furthermore, we are not dealing with a limitation of action provision, 7 N.N.C. § 602(A), in a vacuum. We are dealing with 1 N.N.C. § 555(A)(3), a jurisdictional condition precedent to the Nation's waiver of its sovereign immunity.

Here, the district court found that Johnson was injured on or about March 1, 2013 and that Johnson was required to file her action by March 1, 2015. There is no dispute Johnson filed her complaint on March 27, 2015. Thus, we conclude Johnson failed to file a complaint commencing her action by March 1, 2015. Johnson, thus, failed to comply with 1 N.N.C. § 555(A). In our *de novo* review, we also conclude Johnson failed to comply with 1 N.N.C. § 555(A)(2), which requires the notice of suit to identity of each prospective defendant. "The Navajo Sovereign

Immunity Act does not require that ‘the Navajo Nation’ be named in every case, but requires that ‘each prospective defendant’ be named.” *Chapo*, 8 Nav. R. at 457. Here, the notice of suit stated Johnson “will bring suit against the Navajo Nation, Northern Edge Navajo Casino, and *other John Does yet to be identified* to recover damages for personal injuries... .” Notice of Suit at 1, Petitioners’ Ex. B (emphasis added). Johnson failed to name each prospective defendant, as required.

Petitioners seek a writ of mandamus. However, [s]overeign immunity defenses are jurisdictional and, if well-founded, provide an appropriate basis for issuing a writ of prohibition.” *Atcitty v. District Court for the Judicial District of Window Rock*, 8 Nav. R. 227, 229 (Nav. Sup. Ct. 1996) (citing *Watts v. Sloan*, 7 Nav. R. 185 (Nav. Sup. Ct. 1995)). Johnson filed a complaint more than two years ago on March 27, 2015. Although the Nation moved for dismissal shortly thereafter on June 4, 2015, the district court waited 13 months until it denied the Nation’s motion on July 6, 2016. Despite this Court having said “[q]uestions of governmental immunity present issues which should be resolved early in the litigation to ‘avoid waste of judicial and litigant resources[.]’” *see Atcitty*, 8 Nav. R. at 229, the district court grievously delayed in carrying out its duty to timely consider jurisdiction. Rather than issue a writ of mandamus providing guidance, we hereby issue a writ of prohibition dismissing the suit against the Nation based on the district court’s findings of facts and the outcome demanded by law.

V

The Court hereby ISSUES a WRIT OF PROHIBITION against the Window Rock District Court.

Dated this 31st day of July, 2017.

Allen Sloan

Chief Justice

Allen Sloan

Associate Justice

[Signature]

Associate Justice

No. SC-CV-64-17

NAVAJO NATION SUPREME COURT

Terlyn Sherlock,
Petitioner-Appellee,

v.

The Navajo Election Administration,
Respondent-Appellant.

OPINION

Before HOLGATE, T.J., Chief Justice, SHIRLEY, E., Associate Justice, and WOODY, G., Associate Justice by Designation.

Appeal from the Office of Hearings and Appeals concerning Cause No. OHA-NEA-017-17, Chief Hearing Officer Richie Nez, presiding.

Levon Henry and Ron Haven, Window Rock, Navajo Nation, for Appellant; Bernadine Martin, Gallup, New Mexico, for Appellee.

The Navajo Election Administration sought to remove an elected school board member who had two misdemeanor convictions in the state of Arizona. The Office of Hearings and Appeals reversed the removal having concluded that upon the set aside of Appellee's convictions while in office, there were no convictions that would have otherwise disqualified her from elective office. We reverse.

I

Terlyn Sherlock (Appellee) filed her candidate application with the Navajo Election Administration (Appellant) on May 27, 2016. Appellee indicated "N/A" when asked to list any convictions for felonies or misdemeanors. Appellee also filed a notarized statement that "I meet all the qualifications required by Navajo Nation law for the position I am seeking. I have read and received a copy of all qualifications applicable to the position." *Oath*, R. 18. Appellee also swore

that she understood that “I may be removed as a candidate in the event my application contains a false statement” and “if I am no longer otherwise qualified for office if elected.” *Id.* Based on Appellee’s application, NEA certified Appellee as eligible to run for the position of school board member.

On November 8, 2016, Appellee was elected to her second term as a member of Chilchinbeto Community School Board. The Navajo Board of Election Supervisors certified the results of the election on November 29, 2016, and Appellee took her oath of office on January 12, 2017. On April 13, 2017, the Navajo Department of Diné Education informed NEA that Appellee had two misdemeanor convictions in the state of Arizona, stemming from criminal charges for shoplifting in 1991 and for underage drinking in 1993. *See State of Arizona v. Sherlock*, No. M-0341-109977 (Shoplifting); *State of Arizona v. Sherlock*, No. M-0341-CR-113616 (Liquor-To Minor by Licensee/Underage Consumption). Consequently, on May 19, 2017, NEA provided notice to Appellee of her removal pursuant to 11 N.N.C. § 240(D). On May 31, 2017, Appellee filed a statement of grievance with OHA challenging her removal. Thereafter, at Appellee’s request, on June 28, 2017, the Arizona Municipal Court of Flagstaff issued an order granting Appellee’s motion to set aside her convictions under A.R.S. § 13-907. *State of Arizona v. Sherlock*, Nos. CR113616, CR109977, June 28, 2017.

The OHA ruled that Appellee’s “prior convictions having been set aside, annulled or vacated has the effect of dismissing any convictions covered by 11 N.N.C. § 8(4)(h).” *Final Order* at 3, November 3, 2017. In reaching this conclusion, OHA marginalized the non-reporting of prior convictions stating such convictions were of public record; OHA declined to distinguish *Martine-Alonzo v. Jose*, No. SC-CV-37-16 (Nav. Sup. Ct. November 3, 2016) stating the dismissal of convictions qualifies a candidate; OHA concluded that Appellee’s qualifications remain

unimpeached upon the set aside of her state conviction; and OHA further concluded that there is no evidence that Appellee's convictions impeded a fair election. *Final Order* at 3, November 3, 2017. This appeal ensued.

II

The issues are: 1) whether the set aside of Appellee's prior convictions by the state of Arizona, while in office, absolved Appellee of having to disclose any convictions that would have otherwise disqualified her from elective office; and 2) whether Appellee's negative response to the inquiry about felony and misdemeanor convictions was a false statement under the Election Code so as to remove her from elective office.

III

The Court's standard of review is "limited to whether or not the decision of the Office of Hearings and Appeals is sustained by sufficient evidence on the record." 11 N.N.C. § 24(G) (2005). A decision lacks sufficient evidence and may be reversed if the decision of OHA is based on an erroneous interpretation of the law. *In re Appeal of Lee*, 9 Nav. R. 61, 62 (Nav. Sup. Ct. 2006); *In re Grievance of Wagner*, 9 Nav. R. 114, 115 (Nav. Sup. Ct. 2007). When reviewing the legal interpretations of administrative tribunals, the Court applies a *de novo* standard of review. *Begay v. Navajo Nation Election Administration*, 8 Nav. R. 241, 250 (Nav. Sup. Ct. 2002).

IV

Appellant contends that this appeal concerns the removal of an elected school board member under section 240(D) of the Election Code. Appellant, thus, asserts there is no merit to Appellee's argument that because there were no pre-election nor post-election challenges within the timeframe permitted under 11 N.N.C. §§ 24 or 341, this is an untimely challenge of her

qualifications. Considering Appellee raises a jurisdictional argument, we address this argument at the forefront.

In 2003, the Navajo Nation Council (Council) required school board members to maintain required qualifications throughout their term of office, *see* 11 N.N.C. § 8(D)(4)(j) (2005), or be subject to removal through proceedings initiated by the Navajo Election Administration, *see* 11 N.N.C. § 240(D) (2005). Furthermore, in *Sandoval v. Navajo Election Administration*, No. SC-CV-62-12 (Nav. Sup. Ct. February 26, 2013), this Court stated, “Section 8(D)(4)(j), as amended in 2003, uniquely allows school board members to be challenged on their qualifications under the Election Code after an election.” *Id.*, slip op. at 14. In 2014, Council extended the requirement to maintain qualifications to other elected officials. *See* Resolution No. CJA-02-14 (February 11, 2014). As to school board members, Council clarified that all removal proceedings shall start with NEA, with any necessary hearings conducted by OHA. *See* 11 N.N.C. § 240(D) (as amended by Resolution No. CJA-02-14, February 11, 2014). Removal actions by NEA can be commenced at any time during an elected official’s term of office. We therefore hold that this appeal concerning the removal of an elected official is properly before this Court.

With that said, we address the issues on appeal. Appellant asserts that OHA erred when it determined that the set-aside of Appellee’s prior convictions pursuant to Arizona law has the effect of dismissing any convictions against Appellee that would have otherwise disqualified her from holding office under Navajo law. Appellant asserts Appellee did not disclose her convictions to NEA upon direct inquiry and, because of this non-disclosure, she must be removed as a school board member for having filed a false statement. Appellee, on the other hand, asserts that because her convictions were eventually set aside under Arizona law, legally there were no convictions to report. Therefore, her response was not a false statement. We disagree.

The Navajo Nation Election Code provides that the candidate application shall contain “[a]ny convictions for felonies and misdemeanors affecting qualifications for office.” 11 N.N.C. § 21(B)(3) (as amended by Resolution No. CJA-02-14, February 11, 2014). Convictions affecting the office for school board members are specified in 11 N.N.C. §§ 8(D)(4)(g) and (h). Candidates for school board, among other things, must not have been convicted of any misdemeanor crimes involving the welfare of children, child abuse, or child neglect, *see* 11 N.N.C. § 8(D)(4)(h)(2), and any crimes involving the use of intoxicating alcohol or illegal substance, *see* 11 N.N.C. § 8(D)(4)(h)(4). The Election Code, therefore, requires a school board candidate to disclose any conviction affecting qualifications for office, as requested in a candidate application. Here, Appellee answered “N/A” on May 27, 2016 despite the existence of two prior convictions on her record. Appellee would have us hold that the set aside of Appellee’s prior convictions by the state of Arizona, while in office, absolved Appellee of having to disclose any convictions that would have otherwise disqualified her from elective office. We decline to do so. Because there was no set aside of her convictions at the time that she filed her application, Appellee was required to disclose her prior convictions under Navajo law. Therefore, Appellee’s response of “N/A” was a false statement.

Under these facts, OHA erred in refusing to distinguish the case at bar from this Court’s holding in *Martine-Alonzo v. Jose*, No. SC-CV-37-17 (Nav. Sup. Ct. November 3, 2016). In *Martine-Alonzo*, the state criminal charges at issue were dismissed upon Ms. Jose’s successful completion of a deferred sentencing program *prior* to the filing of her application as a candidate for school board. These facts are wholly distinguished from this case wherein Appellee was granted an order setting aside her criminal charges thirteen (13) months *after* filing her candidate application and six (6) months *after* taking office when NEA sought her removal. Based on OHA’s

failure to distinguish these cases, OHA erred in using the holding in *Martine-Alonzo* to justify its order qualifying Appellee to remain in office. OHA provides insufficient evidence to support its finding that the Arizona court's set aside of criminal charges served as a 'dismissal' of the charges similar to *Martine-Alonzo* so as to "qualify" Appellee to remain in her position as school board member. Thus, OHA's determination that Appellee remains qualified to retain her office is not supported by sufficient evidence. The fact is Appellee was not qualified at the declaration of her candidacy and at the time NEA took action to remove her from office.

Appellee would also have us consider that there was a five-year limitation for felonies and misdemeanors when she first ran for office four years ago and, since then, the candidate application did not reflect the change in law so as to require the disclosure of her prior convictions. We find no merit in this argument. The removal of the five-year limitation occurred over thirteen (13) years ago in 2003 when Council instituted a lifetime ban on certain felonies and misdemeanors. Based on our review of the record, the candidate application reflects the changes in the law.

Appellee also asserts that even if she did not report her convictions, a lifetime ban as to felony and misdemeanor convictions cannot stand. There is no merit in this argument. This Court has upheld the lifetime ban concluding that the heightened qualifications of school board members are reasonable and advance an important governmental interest. *See Sandoval*, slip op. at 8-11. Appellee also asserts that the qualification requirements as to misdemeanor convictions at 11 N.N.C. § 8(D)(4)(h) must be read to be directory rather than mandatory pursuant to *Haskie v. Navajo Board of Elections*, 6 Nav. R. 336 (Nav. Sup. Ct. 1991). Again, there is no merit in this argument. We have said the requirement to maintain qualifications at 11 N.N.C. § 8(D)(4)(j) uniquely allows school board members to be challenged on their qualifications after an election.

Sandoval, slip op. at 14 (now applicable to other elected officials per CJA-02-14). Thus, "Section 8(D)(4)(j) supplants the *Haskie* rule" *Sandoval*, slip op. at 14.

The voting public must be able to rely on the statutory protections of our laws, as well as the truth of candidates' statements as to their qualifications. "In our Navajo thinking, great responsibilities of public service are placed on a *naat'ánii*, greater than may be commonly understood in other jurisdictions." *Sandoval*, slip op. at 13. "A candidate may not circumvent express conditions established by the Council by keeping silent until an election is over. Disqualifying conditions that are known to a candidate are not waived simply because an election has taken place." *Id.*

Similarly, we add the practical application of Navajo reasoning. People enter a *hooghan* through the east door making their presence known to all. Much like entering a *hooghan*, in an election, a *naat'ánii* seeking public office must enter an election with complete transparency. Although a *naat'ánii* enters a *hooghan* like the people he or she serves, the standard of conduct of a *naat'ánii* is higher and stricter. See *Sandoval*, slip op. at 13. "The *naat'aanii* indeed [is] expected to be honest, faithful and truthful in dealing with his [or her] people." *In re Certified Questions II*, 6 Nav. R. 105, 117 (Nav. Sup. Ct. 1989). Thus, a *naat'ánii* betrays the trust of the people when he or she chooses to sneak around the *hooghan* in search of a non-existent side door in an effort to be less than open and honest. Here, Appellee did not enter the election with full disclosure of her personal history, which is expected by the people she serves. Instead, she was silent about her prior convictions and, upon the revelation of her disqualifying convictions, she ran to the state court for an order setting aside her convictions so as to evade removal. We will not condone such behavior. We hereby hold that Appellee's negative response to the inquiry about felony and misdemeanor convictions was a false statement under the Election Code so as to remove her from elected office.

A *naat'ánii* is greatly respected by the people, however, a *naat'ánii* can be relieved of authority if he or she betrays the public trust placed in him or her. See *Navajo Nation v. MacDonald*, 6 Nav. R. 432, 445 (Nav. Sup. Ct. 1991). Section 240 of the Election Code substantiates this position. The Diné people will keep an official to his or her words. *Sandoval*, slip op. at 4 (citing *Kesoli v. Anderson Security Agency*, 8 Nav. R. 724 (Nav. Sup. Ct. 2005)). In the case at hand, Appellee will be held to her sworn statement that she can be removed, if her application contains a false statement or if she is “no longer otherwise qualified for office if elected.” *Oath*, R. 18.

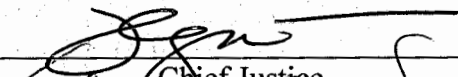
The Election Code requires NEA to “review, verify and determine, on the face of the candidate application, the qualifications for candidacy.” See 11 N.N.C. § 23(A) (2005). As to NEA’s certification process for initiative petitions, we said NEA must use its regulatory due diligence in its duty to “examine, verify and certify.” *In re NEA’s Determination of Insufficiency Regarding Two Initiative Petitions*, 9 Nav. R. 271, 277 (Nav. Sup. Ct. 2009). Likewise, the process for certifying candidates should be more than “a ministerial process” as justified by NEA. The Diné people rightly expect to choose from qualified candidates when they cast their votes. In this case, a ministerial act with sole reliance on a candidate’s word, false declarations in this case, has caused an unqualified candidate to be presented to the public. We are mindful that this is not an isolated event. *E.g., Sandoval, supra*. Time, staffing and public funds are needlessly spent having to litigate matters concerning qualification challenges. Presently, there are no sanctions or penalties in the Election Code that explicitly address the filing of a false statement by a candidate running for office. We, therefore, urge Council to consider adopting strict sanctions to deter such unsavory filings.

Based on the above, OHA's decision is not supported by sufficient evidence. We need not consider the application of A.R.S. § 13-907 because Appellee's conduct predates the set aside. Even if we were to consider, which we do not, based on our cursory review of Arizona law, a set aside of a criminal conviction under A.R.S. § 13-907 does not eliminate the fact of the conviction, and therefore does not relieve an offender from having to report the conviction if asked. *See Russell v. Royal Maccabees Life Ins. Co.*, 974 P.2d 443, 449 (Ariz. Ct. App. 1998).

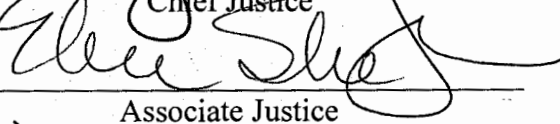
V

Based on the above, we hereby reverse OHA's Final Order of November 3, 2017. The NEA may proceed in its removal of Appellee Terlyn Sherlock under 11 N.N.C. § 240(D). Appellee's request for costs and fees is DENIED.

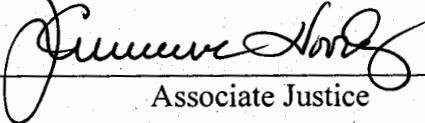
Dated this 26th day of December, 2017.



Chief Justice



Associate Justice



Associate Justice

No. SC-CV-15-18

SUPREME COURT OF THE NAVAJO NATION

Austin C. Bahe,
Petitioner,

v.

Navajo Nation Labor Commission,
Respondent,

And Concerning,
Navajo Engineering and Construction Authority,
Real Party in Interest.

OPINION

Before, JAYNE, J., Chief Justice, SHIRLEY, E., Associate Justice and THOMPSON, C., Associate Justice by Designation.

Original action against the Navajo Nation Labor Commission concerning Cause No. NNLC-2017-034.

David R. Jordan, Gallup, New Mexico, for Petitioner; Jennifer Skeets, Office of the Legislative Counsel, Window Rock, Navajo Nation, for Respondent; and Albert Hale, Phoenix, Arizona, for Real Party in Interest.

Opinion issued by SHIRLEY, Associate Justice.

I

A Petition for Writ of Mandamus was filed on March 22, 2018 and this Court issued an alternative writ setting the matter for a hearing on May 23, 2018. This Court entered a ruling by granting the petition and issuing a Permanent Writ of Mandamus against the Navajo Nation Labor Commission (NNLC) pursuant to 7 N.N.C § 303(C) and, further, stated that a written memorandum decision would follow. This decision follows.

In reviewing the pleadings and after hearing oral arguments, the Court finds that the Real Party in Interest, Navajo Engineering and Construction Authority, had terminated Austin C. Bahe

(Petitioner), who then filed a formal charge with the Office of Navajo Labor Relations. On August 25, 2017, the Office of Navajo Labor Relations issued a Notice of Right to Sue to the Petitioner permitting the filing of a formal complaint. On October 18, 2017, the Petitioner filed a formal complaint with the NNLC and a first Notice of Hearing, dated October 26, 2017, set the matter for hearing on February 08, 2018. A second Notice of Hearing was then issued on February 02, 2018 rescheduling the hearing to August 22, 2018. The rescheduling was done pursuant to the Chief Legislative Counsel's memorandum, dated September 30, 2017. The memorandum advised that, in view of the effective date of October 01, 2017 in CJY-42-16, no hearing would occur until the five (5) Navajo Nation Labor Commissioners were all appointed. To date, only two appointments have been made and three positions continue to remain unfilled. As a result, complaints filed with NNLC have not been adjudicated by the NNLC because of the delayed appointments by the Health, Education and Human Services Committee and the Navajo Nation President.

By law, appointments to the NNLC are made pursuant to 15 N.N.C § 303 of the Navajo Preference in Employment Act (NPEA). The most recent amendments to 15 N.N.C. § 303 under Resolution CJY-42-16 and Law and Order's Resolution LOCMY-01-14 caused confusion about the term of service for the previously appointed NNLC members and the new members. Because of the different interpretations made to 15 N.N.C. § 303, the NNLC has not held any hearings. Thus, the Petitioner filed a Petition for Writ of Mandamus for this Court to mandate the NNLC to adjudicate his complaint pursuant to 15 N.N.C. § 611(A) by deciding the status of 15 N.N.C § 303(D) of the NPEA.

II

The Court concludes that the Petitioner has no plain, speedy and adequate remedy at law. "The Supreme Court shall have the power to issue any writs or orders: . . . C. To cause a Court to

act where such Court fails or refuses to act within its jurisdiction.” 7 N.N.C. § 303(C). “A writ of mandamus will be issued to compel a [respondent tribunal] to perform a judicial duty required by law, only if there is no plain, speedy and adequate remedy at law. *Yellowhorse, Inc. v. Window Rock District Court*, 5 Nav. R. 85, 87 (Nav. Sup. Ct. 1986). The NNLC has scheduled and re-scheduled a hearing on the merits of Petitioner’s complaint with no certainty that a hearing under 15 N.N.C. § 611(A) will be held because of the delayed appointments of commission members. Respondent asserts it has met its obligation under § 611(A), which states “the Commission shall schedule a hearing within 60 days of the filing of a written complaint by a petitioner with the Commission.” Respondent cites this Court’s previous holding that § 611(A) requires only that a hearing be scheduled and not be held. *E.g., Dilcon Navajo Westerner/True Value Store v. Jensen*, 8 Nav. R. 28, 36 (Nav. Sup. Ct. 2000). Though the NNLC’s duty under § 611(A) is argued, it is the NNLC’s purpose under § 302 and its duties and responsibilities under § 304 that are decisive when considering the larger obligations to the Navajo people. Further, the Respondent relied on cases, which were decided under entirely different facts during a time when there was a full panel of the NNLC. Under the facts of this case, there is no fully appointed body of the NNLC, or quorum, due to the delayed appointments of its members causing a complete failure of the NNLC to act as authorized and directed to under § 304. .

III

The Court concludes that the Petitioner has met the requirements for a permanent writ of mandamus. “A writ of mandamus, pursuant to 7 N.T.C. § 303 [now at 7 N.N.C. § 303], is used to compel a lower court to perform existing duties within its jurisdiction. It is imperative to show that the petition initially show that 1) he/she has a legal right to have the particular act performed; 2) the respondent [decision maker] has a legal duty to perform the act; and 3) the respondent [decision

maker] failed or neglected to perform the act.” *Yellowhorse, Inc. v. Window Rock District Court*, 5 Nav. R. 85, 87 (Nav. Sup. Ct. 1986); *In the Matter of A.P.*, 8 Nav. R. 671, 678 (Nav. Sup. Ct. 2005). The Commission is established to hear and adjudicate cases as the quasi-judicial hearing body under the Navajo Preference in Employment Act. 15 N.N.C. § 302(A). Due process is denied when the Commission fails to carry out its statutory duties under § 304. Here, when the Commission scheduled and rescheduled Petitioner’s hearings under 15 N.N.C. § 611(A), it failed to show that it performed its existing duties as specified in § 304 and its actions respected Petitioner’s right to due process.

The Navajo Nation Council established the NNLC to process and decide all formal complaints under the statutory structure of the NPEA. 15 N.N.C. § 302(C). Because of the authorization given to NNLC as a quasi-judicial body to hear and adjudicate employment cases, the NNLC must carry out these statutory duties. The NNLC has a fiduciary duty to the Navajo people to execute the trust the people have placed with them. See *Thinn v. Navajo Generating Station, Salt River Project*, 9 Nav. R. 140 (Nav. Sup. Ct. 2010). The NNLC is part of the Navajo Nation Government and we must not lose sight of the fact that the NNLC also works for and on behalf of the collective Navajo people in their role as *naat’aanii*. *Meadows v. Navajo Nation Labor Commission*, 9 Nav. R. 597, 601, (Nav. Sup. Ct. 2012). As a *naat’aanii*, it is a duty and an obligation to always work and seek a solution for the people, especially when the *ana’ hoot’i’* concerns one’s daily livelihood and requires an harmonious resolution. “Managing its administrative law system in a manner that ensure both access and due process is the sacred duty placed by the Council upon the Commission.” *Id.* Processing and deciding all complaints filed pursuant to fiduciary standards. *Id.* Therefore, it is the NNLC’s duty to have a system that ensures access by holding hearings for all litigants. The NNLC has a duty to adjudicate cases in the interest

of due process and must carry out its sacred duties to the people. Strict adherence to the NPEA and the due process protections of the Navajo Bill of Rights are demanded. *Id.* Here, the Court finds that the Petitioner has a legal right to have his complaint heard by the NNLC and the NNLC is legally bound by law to hear his complaint. Petitioner's filing of the complaint was done on October 18, 2017 and the first notice of hearing, dated October 26, 2017, set the matter for a hearing on February 8, 2018 pursuant to § 611(A). On February 02, 2018, a second Notice of Hearing was then issued rescheduling the hearing to August 22, 2018. Despite the statutory authorization and a mandatory duty to adjudicate cases, the NNLC failed to conduct the set hearing. As of October 01, 2017, the NNLC has not convened to hear any formal complaint that has been filed with the administrative hearing body.

IV

The Court concludes 15 N.N.C § 303(D) of the NPEA with its hold-over provision is in effect. Petitioner asserts that pursuant to the hold-over provision of 15 N.N.C § 303(D), the previously appointed Commission members continue to serve in their positions until his or her successor is appointed and that the amended provisions of 15 N.N.C § 303(A) and (B) as contained in CJY-42-16 did not change or rescind § 303(D). By taking this position, Petitioner believes that NNLC has the necessary commission members to convene and conduct a hearing to hear his complaint.

The NNLC was created by the Navajo Nation Council for the purpose of hearing and adjudicating cases as the quasi-judicial hearing body under the NPEA. 15 N.N.C § 302 (2008). The Navajo Nation Council established the composition and qualifications of the Commission at 15 N.N.C. § 303(A) and (B). These two provisions are the subject of contention by the parties.

In 2016, the Navajo Nation Council amended these two provisions which now read:

- A. Membership. The Commission shall consist of: (2) two members of appointed by Health, Education, and Human Services Committee of the Navajo Nation Council to be designated by that committee; and (3) three members appointed by the President of the Navajo Nation with the concurrence of the ~~Government Service~~ Naabik'iyati' Committee of the Navajo Nation Council.
- B. Commission Members Qualification: ~~The two members of the Human Services Committee and the three members of the Commission appointed by the President of the Navajo Nation shall be familiar with labor practices, Human resources and employment of the Navajo Nation. One appointed Member shall be a Navajo worker familiar with human resources and Employment practices. Neither the Executive Director of the Division Of Human Resources ("DHR"), the Director of the Division of Human Resources ("DHR"), the Directors of any department within DHR, nor any Person employed by DHR or its departments shall be eligible to serve as a Member of the Commission.~~

The five Commission members shall be 1) familiar with the Navajo Nation labor practices, human resources and employment; 2) member of the Navajo Nation Bar in good standing, and; 3) two Commission members shall be licensed to practice law in either Arizona, New Mexico, or Utah.

Resolution CJY-42-16 (July 21, 2016).

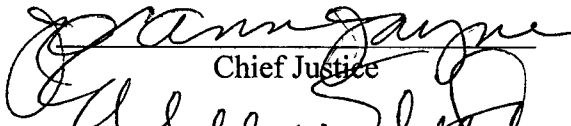
Respondent claims that prior to the passage of CJY-42-16, in 2014, the Law and Order Committee of the Navajo Nation Council amended 15 N.N.C § 303(D) and repealed the hold-over provision therein. However, in the passage of CJY-42-16 there is no inclusion of the purported language of LOCMY-01-14 when the Navajo Nation Council later amended the qualifications of members in CJY-42-16. Further, there was no underscore or overstrikes in LOCMY-01-14 as required by 2 N.N.C. § 164(D). Rather than recognize conflicting provisions of LOCMY-01-14 by a standing committee of the Navajo Nation Council, this Court recognizes the action of the full Council in the passage of CJY-42-16.

This Court notes that 15 N.N.C § 303(A) and (B) were the only changes in CJY-42-16. The provision of 15 N.N.C § 303(D) as it pertains to the Term of Office remained un-touched. The Court notes that when a legislator introduces a legislation, it must follow a certain format as

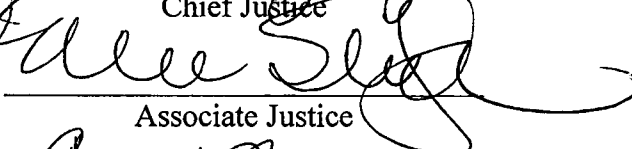
outlined in 2 N.N.C. § 164 (as amended by Resolution CAP-10-11, May 11, 2011) before the legislature can take the matter under consideration. The Court takes judicial notice that it has been the practice of the legislature to underscore new proposed language and overstrike language proposed for deletion as required by 2 N.N.C. § 164(D). Thus, an action by the legislature is presumed to be a valid enactment. *Navajo Nation v. MacDonald*, 6 Nav. R. 463, 467 (W.R. Dist. Ct. May 17, 1989). The rationale given to the legislative body is that when they are carrying out their legislative act, it is done with much discussion and deliberation under the guiding principle of the best interest of the Navajo people. Despite the Respondent's argument that CJY-42-16 repealed the hold-over provision of § 303(D), Respondent failed to show the language was overstricken. This Court recognizes the validity of CJY-42-16 and, absence of any overstricken language of 15 N.N.C. § 303(D), it is still an operative provision. We hold that CJY-42-16 did not repeal the hold-over provision of 15 N.N.C. § 303(D). More specifically, the hold-over provision at 15 N.N.C. § 303(D) provides that "[E]ach member of the Commission shall serve a term of four years *and until his or her successor is appointed.*" (Emphasis added.) This provision permits previously appointed members to continue serving on the NNLC until such time a successor is appointed and confirmed. With two appointments made thus far and, in conjunction, with previously appointed members who continue to serve, the NNLC has a fully seated panel to meet and adjudicate employments cases. We, therefore, reject Respondent's argument that previously appointed members on the NNLC are no longer serving and that the Commission lacks a panel as a result of the effective date as contained in CJY-42-16. This Court opines that the NPEA amendments concerning qualifications and the hold-over provision under § 303(D) must be read together.

The Petition for Writ of Mandamus is hereby GRANTED. Recognizing previously seated Commissioners must serve until his or her successor is appointed, 15 N.N.C. § 303(D), the Court also ORDERS the Commission of previously appointed Commissioners and newly appointed Commissioners to hear and adjudicate cases without further delay. Furthermore, the Court ORDERS the Commission to re-schedule and conduct Petitioner Bahe's hearing before August 22, 2018.

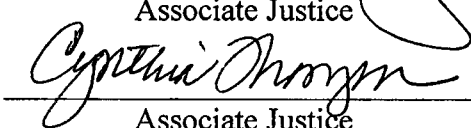
Dated this 29 day of June, 2018.



Chief Justice



Associate Justice



Associate Justice

Navajo Nation Law CLE

Section 3

Update on Navajo Nation Law

Navajo Legislative Update
(Candace French &
Jasmine Blackwater-Nygren)

Office of Legislative Counsel
Legislative Branch
Navajo Nation

Legislative Update

**OFFICE OF LEGISLATIVE
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Ed McCool, Principal Attorney
Kristen Lowell, Principal Attorney
Candace French, Attorney

Office of Legislative Counsel

The purpose of the Office of Legislative Counsel is to provide legal advice, legal representation and legislative services to the Navajo Nation Council, standing committees, commissions, and boards of the Navajo Nation Council, offices and programs of the Legislative Branch of the Navajo Nation, independent of the Department of Justice. 2 N.N.C. § 961

Office of Legislative Counsel

Authorities, duties and responsibilities

- ❖ To provide legal representation to the Navajo Nation Council, standing committees, commissions and boards of the Navajo Nation Council, offices and programs of the Legislative Branch, independent of the Department of Justice, through Office of Legislative Counsel and outside counsel contracted by the Office of Legislative Counsel, to represent the legal interests of the Legislative Branch of the Navajo Nation

❖ 2 N.N.C. § 964(A)(5)

Five Standing Committees

- Budget & Finance (BFC) 2 N.N.C. § 300 et seq.
- Health, Education & Human Services (HEHS) 2 N.N.C. § 400 et seq.
- Resources & Development (RDC) 2 N.N.C. § 500 et seq.
 - Law & Order (LOC) 2 N.N.C. § 600 et seq.
 - Naabik'iyáti' (NABI) 2 N.N.C. § 700 et seq.

- Navajo Nation Initiative
 - 88 Delegates to 24 Delegates
- CAP-10-11
 - Reflects changes from 88 to 24 including reduction in standing committees and modifies legislative process to include public comment and emergency legislation
- CO-45-12:
 - Reflects reduction to 24 and revised quorum and committee directives

Office of Legislative Counsel

Helpful Information:

CD-68-89

Resolutions

❖C = Council

❖D = December

❖68 = 68th resolution of the year

❖89 = year (1989)

Examples:

LOCJY-14-18

RDCJN-56-18

BFAU-34-18

HEHSCF-04-18

NABIS-50-18

Judicial Appointments

- ☐ CONFIRMING RHONDA TUNI AS PROBATIONARY DISTRICT COURT JUDGE – CJA-06-18
- ☐ CONFIRMING THE PROBATIONARY APPOINTMENT OF JOANN JAYNE AS NAVAJO NATION CHIEF JUSTICE – CJA-04-18
- ☐ CONFIRMING TINA TSINIGINE AS PROBATIONARY DISTRICT COURT JUDGE – CO-66-17
- ☐ CONFIRMING THE HONORABLE MALCOM BEGAY AS PERMANENT DISTRICT JUDGE – CO-67-17

Code Amendments

- ☐ Approving the “Navajo Nation Veterans Trust Fund Income Act” to Amend the Navajo Nation Code, Title 12, Chapter 10, Subchapter 8, Navajo Nation Veterans Trust Fund, Section 1171 Establishment (A) and Section 1175 Definition of Principal and Income (A)(B) – CO-63-17, Override of Presidential Veto – CD-74-17

Code Amendments

- ☐ Amending 2 N.N.C. § 164(B), Agreements not Requiring Committee or Council Approval – CJA-01-18
- ☐ Approving Amendments to 12 N.N.C. § 1176 of the Navajo Nation Veterans Trust Fund – CJA-02-18
- ☐ Amending 24 N.N.C. § 620 of the Navajo Nation Sales Tax; Allocating 1 Percent of the Sales Tax to Navajo Nation Fire and Rescue Services – CJA-07-18
- ☐ Amending the Navajo Nation Criminal Code at 17 N.N.C. §§ 203, 209, 303.01, 318 and 319 for Purposes of Addressing Cyberbullying – CJA-09-18

Code Amendments

- ☐ Amending Navajo Nation Code Title 24 by Enacting the Uniform Local Tax Code – CJA-12-18
- ☐ Amending *Per Diem* Provision of 2 N.N.C. § 874(F) – CAP-37-18
- ☐ Approving “The Department of Diné Education Administrative Act of 2017”; Amending the Navajo Nation Code, Title 10, Chapter 1, Subchapter 2, Sections 106 and 107 Establishing Direct Administrative Responsibility Within the Department of Diné Education – CAP-45-18
- ☐ Enacting the Revenge Porn Act and Amending Title 17 Sex Offenses – CAP-43-18

And more Code Amendments

- ☐ Amending Navajo Nation Code Title 2 Section 1033 by Establishing the Navajo veterans Housing Program within the NVA – CJY-55-18
- ☐ Amending Title 13 of Navajo Nation Code relating to dog and cat control and Title 3 relating to livestock – CJY-64-18
- ☐ Amending 2 N.N.C. Sections 1066-1067 and 17 N.N.C. Sections 101-104 Navajo nation Peace Officer Standards and Training Certification Act – CJY-66-18



SELECT STANDING COMMITTEE RESOLUTIONS – by statute, Standing Committees have final authority over certain matters.

- ☐ Amending the 2016-2020 Navajo Nation School Board Apportionment Plan – HEHSCS-23-17
- ☐ Approving an Amendment to the Navajo Nation Homesite Lease Regulations, RDCO-74-16, to Waive Fees, Penalties and Fines for Individuals Sixty-Five (65) Years of Age, or Older, and for Honorably Discharged Veterans – RDCMY-53-18
- ☐ Amending the Plan of Operation for Navajo Nation Police Department – LOCAP-o8-18
- ☐ Establishing and Authorizing the Navajo Nation Genetics Policy Development Working Group to Develop a Genetics Research Policy for the Navajo Nation and Amendments to the Navajo Nation Human Research Code – NABIF-09-18
- ☐ Opposing the Closure of ONHIR – NABIMY-29-18
- ☐ Opposing Presidential Proclamation 9681 titled "Modifying the Bears Ears National Monument" – NABIMY-32-18

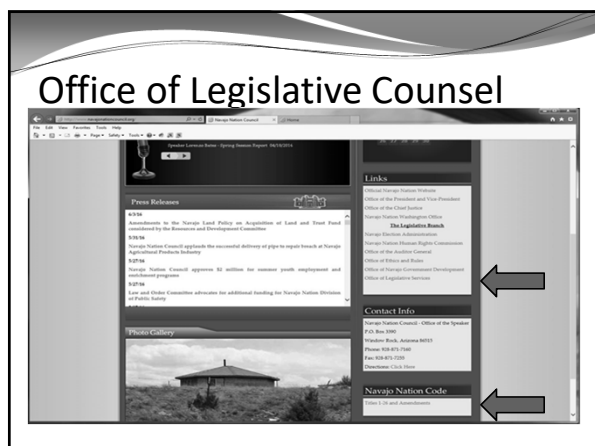
Standing Committee Amendments

NEW CODE SUPPLEMENTS ARE IN

A black and white photograph of a young child laughing heartily, wearing a plaid shirt. The image is framed within the slide.

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Navajo Nation Law CLE

Section 4

**Taking Your Turn:
Representing Pro Bono
Navajo clients
(Raven Attwood)**

Taking Your Turn: Pro Bono Indigent Defense

By Raven Joaquín Attwood,
Attorney with Office of the Navajo Public Defender,
Tuba City Office

I. Introduction

- A. *“Hazhó’ógo is not a man-made law, but rather a fundamental tenet of informing us how we must approach each other as individuals. When discussions become heated, whether in a family setting, in a community meeting or between any people, it’s not uncommon for an elderly person to stand and say “hazhó’ógo, hazhó’ógo sha ‘álchíní.” The intent is to remind those involved that they are Nohookáá’Dine’é, dealing with another Nohookáá’ Dine’é, and that therefore patience and respect are due. When faced with important matters, it is inappropriate to rush to conclusion or to push a decision without explanation and consideration to those involved. Áádóó na’níle’ dii éi dooda. (Delicate matters and things of importance must not be approached recklessly, carelessly, or with indifference to consequences). This is hazhó’ógo, and we see that this is an underlying principle in everyday dealings with relatives and other individuals, as well as an underlying principle in our governmental institutions. Modern court procedures and our other adopted ways are all intended to be conducted with hozhó’ógo in mind.” Navajo Nation v. Rodriguez, 8 Nav. R. 604, 615 (Nav. Sup. Ct. 2004).*
- B. Nearly every important Navajo Supreme Court ruling in criminal law calls upon Fundamental Law to strengthen and enhance the Navajo Nation Bill of Rights.
 - 1. Fundamental law arguments are essential in nearly every possible contested law issue in Navajo criminal law: “We consider all ways of thinking and possible approaches to a problem, including Federal law approaches, and we weight their underlying values and effects to decide what is best for our people. We have applied Federal interpretations, but have augmented them with Navajo values, often providing broader rights than that provided in the equivalent Federal provision.” *Rodriguez*, 8 Nav. R. at 614.
 - 2. There is excellent case law instructing on application of key Fundamental Law principles to Navajo Criminal Law. Know it, embrace it, and argue it!
- C. No substitute for a thorough, in-person interview
 - 1. Family members often want to be involved: explain attorney-client privilege
 - 2. Listen to family members in front of clients, listen to clients one-on-one.
- D. Don’t be quick to withdraw. Often there have already been delays because our office has withdrawn for conflict.
- E. Appear in person for hearings if you can. Telephonic appearance for PTC and motion hearings where there is no evidentiary issue may be OK if you’ve had an opportunity for an in-person interview with the client, but only as a last resort.

- F. Apologies for citations, which for cases 2006-present are a mix of slip opinions and American Tribal Law reporter (citations available in Westlaw). Navajo Reporter vol. 9 also contains most of these cases, and if available use of those citations in motions is preferable.

II. Criminal Defense

A. Evaluating a case: common legal issues

1. Multiple complaints

- a. Whenever possible, make sure you are appointed or enter appearance on all complaints arising from an incident, even if they do not involve jail
- b. Double Jeopardy: the *Kelly* rule
 - i. *Navajo Nation v. Kelly* SC-CR-04-05 (Nav. Sup. Ct. 2006)
 - ii. Distinct Navajo legal interpretation of double jeopardy, applying *Diné bi beenahaz'áanii*.
 - iii. Explicit departure from the *Blockburger* test, *United States v. Blockburger*, 517 U.S. 299, 304 (1996) and *Missouri v Hunter*, 459 U.S. 359, 368-69 (1983).
 - iv. "As the functional equivalent of traditional dispute resolution through an agreement, a conviction and sentencing should be the final resolution of the dispute caused by a defendant's single action. Multiple charges under multiple statutory offenses for a single action undermine that finality, as conviction for a single offense does not resolve the entire dispute. The Navajo Nation courts therefore cannot lightly apply multiple statutory offenses to a defendant's single action. The Council must clearly intend the separate offenses to punish separate conduct, and therefore resolve separate disputes." *Kelly*, slip. op. at 7
 - v. "Therefore, prosecutors must be aware that multiple charges arising out of a defendant's single action may not allow multiple convictions, as the offenses charged must clearly resolve separate conduct to not violate a defendant's double jeopardy right."
 - Some prosecutors are better at paying attention to this than others
 - Watch for "word wall" facts sections on complaints
 - Don't let Navajo Nation get away with trying to claim some details apply to one complaint and some to another—a criminal defendant has no way of

distinguishing hair-splitting details that may be clear to the legally trained eye.

- Navajo Nation continually tries to insist that if there is more than one victim, that is enough to uphold multiple charges.
 - More than one victim can be listed on a single complaint, and the sentencing discretion of the Court is broad, allowing for taking into account the entirety of the impact of the defendant's conduct, including *nalyeeh* for multiple affected individuals, as the goal is to restore *hozhó* among not just the parties, but all "participants to the agreement." *Kelly*, slip. op. at 7.
 - Since one party in a criminal case is the government, it is capable of asking for *nalyeeh* for multiple individuals affected, appropriate rehabilitation measures for the defendant, and so on.

vi. Practical application

- Facts in *Kelly*
 - Defendant charged with Reckless Driving and Homicide by Vehicle. Single act of reckless driving resulting in a death fulfills both offenses, but charging Defendant with both is double jeopardy *Kelly* slip. op. at 9.
 - Footnote example: reckless driving observed by officer followed by failing to obey lawful order to pull over would be *separate* conduct *Kelly* slip. op. at 8, FN 2.
- Other examples:
 - Endangering the Welfare of a Minor charged for DV altercation in front of child in which defendant is also charged with Battery of a Family Member
 - Multiple Threatening charges for the same statement made to multiple individuals at once → separate victims are not separate actions by defendant
 - Fraud and Forgery charges for cashing the same fraudulent check
- Supreme Court specifically raises issues such as pressure which can be placed on defendants with plea agreements when multiple charges are in front of them, or seeking to increase the chances for conviction, which are contrary to the objective of Navajo criminal law
 - Therefore, file Motions to Compel as soon as possible in the proceedings when it is an issue
 - May become a bargaining chip in plea agreement if motion is outstanding; my rule of thumb: never advise a client to accept a plea agreement on charges you evaluate as multiplicitous unless it involves dismissal of

all the problem charges, and make the issue and your likelihood of success at having them dismissed without the agreement clear to the client.

- Recent statutory push-back ripe for challenge: Human Trafficking statute
 - 17 N.N.C. §653, created by CJY-48-17, August 7, 2017.
 - 17 N.N.C. §653(C): “Unit of Prosecution. Prosecution for human trafficking shall not prevent prosecution under any other provision of law when violations of other provisions may be prosecuted from the same circumstances.”
 - “The Court will apply heightened scrutiny to provisions that allegedly create separate offenses based on a single action, and in the absence of clear intent that the statutory offenses indeed punish separate conduct, multiple convictions for the same conduct will be barred by double jeopardy.”—*Kelly Slip. op.* at 8.

vi. Sample motions included in materials

2. *De minimis* Complaints

- a. 17 N.N.C. §226
- b. Facts on the complaint *prima facie* do not meet the statutory elements.
- c. Unlike motion to dismiss for defective complaint, this Motion to Dismiss is not restricted to 15 days after arraignment by N. R. Cr. P.
- d. Most common: Criminal Nuisance
- e. Sample motion included in materials

3. Due Process issues: *Hazhó’ógo*:

- a. “In our Navajo way of thinking we must communicate clearly and concisely to each other so that we may understand the meaning of our words and the effect of our actions based on those words. The responsibility of the government is even stronger when a fundamental right....is involved.” *Navajo Nation v. Rodriguez*, 8 Nav. R. 604, 615 (Nav. Sup. Ct. 2004)
- b. Applied to explanation and waiver of *Miranda* right against self-incrimination
 - i. *Navajo Nation v. Rodriguez*, 8 Nav. R. 604, 616 (Nav. Sup. Ct. 2004).
 - ii. “[P]olice and other law enforcement entities and agencies, must provide a form for the person in custody to show their voluntary waiver. They must also explain the rights on the form sufficiently for the person in custody to understand them. Merely providing a written English language form is not enough. The sufficiency of the explanation in a Navajo setting means, at a minimum that the rights be explained in Navajo if the police officer or other interviewer has reason to know the person

speaks or understands Navajo. If the person does not speak or understand Navajo, the rights should be explained in English so that the person has a minimum understanding of the impact of any waiver. Only then will a signature on a waiver form allow admission of any subsequent statement into evidence.” *Id* at 616.

- c. Applied to explanation of different types of pleas and their effect, correct notice of possible sentence, and review of the factual basis for a complaint when Defendant changes plea at arraignment. *Navajo Nation v. Morgan*, 8 Nav. R. 732 at 738 (Nav. Sup. Ct. 2005).
- d. Applied to waiver of jury trial: “As *hazhó’ógo* requires meaningful notice and explanation of a right before a waiver of that right is effective, it requires, at a bare minimum, that the Nation give notice that the right to a jury trial may be waived by inaction.” *Erachio v. Ramah Dist. Ct.*, 8 Nav. R. 617, 626 (Nav. Sup. Ct. 2005).

4. Discovery issues

- a. Open File Rule *See Navajo Nation v. Tso* Slip op. SC-CR-03-16 (Nav. Sup. Ct. 2016) & *Acothley v. Perry* Slip op. SC-CV-08-11 (Nav. Sup. Ct. 2011).
- b. Ask early, ask often, ask in writing, ask in person
- c. ask for witness interviews ASAP, preferably before PTC, when there are likely contested issues or possibly uncooperative Navajo Nation witnesses
- d. Always address discovery issues with Navajo Nation first, then file motions if necessary
- e. Sample Discovery request notice and letter, and Motion to dismiss for Lack of Disclosure which distinguishes *Tso* and *Acothley* included

5. Speedy trial

- a. case law: *Seaton v. Greyeyes* Slip. op. SC-CV-04-06 (Nav. Sup. Ct. 2006).
- b. sample motion included
- c. Untested issue: attachment of speedy trial right at time of arrest
 - i. “it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.”
 - ii. No Navajo Nation case law on point
 - iii. “While we are not required to apply federal interpretations, we nonetheless consider them in our analysis. We consider all ways of thinking and possible approaches to a problem, including Federal law approaches, and we weight their underlying values and effects to decide what is best for our people. We have applied Federal interpretations, but have augmented them with Navajo values, often providing broader rights than that

provided in the equivalent Federal provision.” *Rodriguez*, 8 Nav. R. at 614.

- d. Counsel can violate if you don’t consult client before a continuance
- 6. Pretrial release
 - a. Approach Navajo Nation re: stipulated release
 - i. May be with conditions such as supervision by Probation and Parole Services.
 - ii. May be on 3rd party rather than cash bond. 17 N.N.C. §1808.
 - b. If Navajo Nation will not stipulate, file a motion to change release conditions anyway!
 - c. If they are being held on a bond they cannot afford, ask for removal or reduction of bond based on indigent status.
 - d. Sample motion included in materials, with both release conditions agreement and third party agreement
- 7. Jury Trial: Must ask for it in writing within 15 days of arraignment; required to inform defendant of the right at arraignment. *Erachio v. Ramah Dist. Ct.*, 8 Nav. R. 617, 626 (Nav. Sup. Ct. 2005).
- 8. Witness interviews
 - a. Ask for Navajo Nation to arrange them.
 - b. Victims’ rights do not shield victim-witnesses from interview under Navajo Nation law.
- B. Timeline
 - 1. Navajo Rules of Criminal Procedure available at <http://www.navajocourts.org/indexdistct.htm>
 - 2. Crib sheet for rules timeline provided in materials
- C. Pretrial Hearings:
 - 1. Arraignment
 - a. Ensure defendant was served
 - b. Check for defective complaint
 - c. relatively rare to receive case before arraignment
 - d. can be waived or attended telephonically, but pleas do so only if you have had the opportunity to sit down with the client before doing so and make sure they understand their rights and the offenses with which they are charged
 - 2. Bail Hearing
 - a. May be held after arraignment date if defendant asked for assistance of counsel at arraignment *Bitsie v. Greyeyes* 10 Am. Tribal Law 95, 98 (FN 2) (Nav. Sup. Ct. 2011).

- b. Ensure defendant was properly arraigned on charge for which he is being held
 - c. Release without bail at arraignment is presumptive, unless Navajo Nation objects and a judge makes “certain findings” on the record against release. *Wood v. Window Rock Dist. Ct.* Slip. op. SC-CV-20-09 at 6 (Nav. Sup. Ct. 2009).
 - d. Navajo Nation must file a motion to hold defendant without bail *Wood*, 8 Am. Tribal Law at 258.
 - i. Usually such a motion is filed with complaint
 - ii. Post-arraignment bail issues such as motions to change release conditions must be addressed promptly, and prolonged delays in hearing them is cruel and unusual punishment under the Navajo Bill of Rights. *Wood* slip. op. at 9-10.
 - iii. Right to counsel
- 3. Bond: If a defendant is being held under any circumstance other than following a properly conducted bail hearing on a motion by Navajo Nation, a motion to amend release conditions is worthwhile unless the defendant has already paid the bond set before you meet with them.
 - i. “[T]he purpose of bail....is to ensure a defendant’s appearance at trial.” *Wood* slip. op. at 8.
 - ii. Court cannot unilaterally make findings about a defendant such as dangerousness as a substitute for finding facts based upon evidence presented by Navajo Nation at arraignment. *Wood* slip. op. at 8.
 - iii. Setting a bail higher than a defendant is capable of paying and refusal to consider alternatives such as third party release.
- 3. Pre-Trial Conference (PTC)
 - a. Usually the hearing set when you receive appointment
 - b. Opportunity to discuss discovery issues, Navajo Nation may extend plea offer
 - c. Evaluating plea offers:
 - i. Ensure prosecutor has communicated with victim, esp. in domestic violence cases.
 - ii. Typical probation pleas sentence defendant to jail and suspend that length of jail time for an equal length of probation.

- Basis: *Navajo Nation v. Jones* 1 Nav. R. 14, 15 (Nav. Ct. App. 1971). “The Navajo Code does not provide for a mandatory sentence of probation and rightfully so for that in itself would be cruel and inhuman. A convicted person entitled to be sentence in accordance with the law and not sentenced in accordance with what some individual believes is best for him; anything less is not justice under the law. Section 909(a), Title 17, Navajo Tribal Code, probation, provides in effect that the Court must impose sentence upon a convicted Indian under Title 17 before he may grant probation. Probation is granted by suspending the sentence for the period of the sentence, nothing less and nothing more.”
- Current statute: 17 N.N.C. §1818
 - “(A) The Court of the Navajo Nation may in its discretion suspend any sentence impose and allow the officer his or her freedom on probation upon his or her signing a pledge of good conduct during the period of the sentence upon the form provided therefor.
 - (B) Any person who shall violate his or her probation pledge shall be required to serve the original sentence.
 -
 - (D) Individuals who are convicted of any offense may be sentenced to a term of probation not to exceed two years and individuals convicted of multiple offenses may be sentenced to a term of probation not to exceed five years.
- Upshot: Argue shorter jail for proposed length of probation as 17 N.N.C. §1818(D) clearly contemplates that probation, which is not mandatory but must be agreed to by the defendant, can be longer than the given jail sentence, and *Jones* makes clear that the jail sentence should be fair *of itself*.

iii. Where appropriate, suggest pleas to lesser charges, especially if they fit the facts better or if charged offense has mandatory jail sentence and rehabilitation would be more appropriate

Ex: Assault rather than Assault on a Peace Officer
(allows for probation)

iv. Make sure any plea offer resolves outstanding issues such as multiplicitous and *de minimis* charges

v. Many prosecutors can be negotiated with re: plea offer. If services they ask for seem inappropriate for defendant, suggest changes

- vi. Deferred prosecution: ask for it when it seems appropriate, rather than change of plea
- viii. Navajo Nation prosecutors do not typically revoke plea offers or make them less favorable in the event of continuance for discovery, in accordance with Navajo fundamental value of talking it out.
- d. If you receive a case already set for trial, reach out to client ASAP.
 - i. Usually appropriate to file motion to vacate trial and reset for Pre-Trial Conference, unless client is being held without bond or simply doesn't want the delay
 - ii. sample motion included in materials

D. Other common concerns:

1. Navajo speakers
 - a. Clients have a right to proceedings and explanations in Navajo, especially if waiver of rights is involved. *Rodriguez* 8 Nav. R. at 616.
 - b. Witnesses who are Navajo speakers should be interviewed and be permitted to give their testimony and be cross-examined in Navajo
 - c. Police reports often have double-hearsay as officers rely on family members to translate, making witness interviews crucial
 - d. Judges speak Navajo and there are court clerks certified to transcribe Navajo, but there are no certified translators on Judicial staff
 - e. Consequently, if you do not speak Navajo or have resources within your firm to call upon to assist with this, withdrawal with notice to the court that the defendant needs Navajo speaking counsel may be necessary.
2. Rule 19
 - a. Biggest challenge is usually getting an evaluation done; Navajo Nation will work with you.
 - b. There is no Court funding to pay for private evaluations and IHS won't do it; may have to rely on defendant's insurance (Usually medicaid/AHCCCS).
3. Concurrent Federal prosecution
 - a. Be wary of changing plea on Navajo charges if client has or might go Federal
 - b. No Contest plea may be preferable to Guilty plea to avoid self-incrimination that could be used in Federal court
 - c. Navajo Nation can dismiss pursuant to 17 N.N.C. §1966, but usually want to wait for outcome of Federal case first
 - d. Work with Federal appointed counsel, with client's consent
 - e. Client counseling forms included
 - f. Skip defendant interview with Probation officer for pre-sentence report
4. Other things clients need to know for some charges:
 - a. SORNA implications

- i. Judge required to inform defendant of possibility of registration at arraignment 17 N.N.C. §220(D).
 - ii. Game changer re: change of plea; make sure client understands the repercussions
 - b. Prohibited possessor of firearms
 - i. Navajo law: 17 N.N.C. §546: Possession of a Firearm: “A. An individual commits possession of a firearm when that individual has been convicted of an offense under this subchapter [Family Violence Act] and/or a valid protection order issued against him/her under the Domestic Abuse Protection Act or similar order by another jurisdiction, and if he/she possesses any firearm.”
 - ii. Federal law: 18 U.S.C. §922(g)(9).
 - This law states:
It shall be unlawful for any person—
(9) who has been convicted in any court of a misdemeanor crime of domestic violence,
to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.
 - This law affects anyone convicted of a misdemeanor under Federal, State, or Tribal law, including in Navajo Nation court, which “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.” 18 U.S.C. §921(a)(33)(A)(ii).
 - iii. Client counseling form re: Federal statute included
- 5. When you receive the case at the sentencing stage:
 - a. Review recording of hearing at which client changed plea
 - b. If there are any due process concerns, file a motion to withdraw the client’s guilty plea and enter plea of not guilty
 - c. Not too late to check for double jeopardy concerns
 - d. make sure client understands the Pre-sentence report and interview for more information.

III. Juvenile Delinquency

- A. The Áłchíní Bi Beehaz’áanii Act can be found at:

<http://www.navajonationcouncil.org/Navajo%20Nation%20Codes/Title%209/CO-38-11.pdf>

- B. Often the same concerns as criminal cases: detention, competency, multiplicitous charges, discovery, etc.
- C. Check if there are any charges, including CHINS, on which you were not appointed, out of the same incident
- D. Rules of Procedure
 - 1. ABBA rules have not been approved
 - 2. The old Children's Code rules (included in materials) are therefore still valid
 - 3. Civil Rules cover anything not in the Children's Code rules
- E. Timelines: examine closely to see they are followed correctly.
- F. Hearings
 - 1. Preliminary hearing: Probable cause determination required: Children's Code Rule 9, not contradicted or invalidated by ABBA.
 - 2. Adjudicatory hearing
 - a. Rules of Evidence apply
 - b. Should be handled like any criminal trial
- G. Stipulated admissions and consent decrees:
 - 1. Appropriate for juvenile to consult parents as well as counsel in making decision, but it is the juvenile's decision to make.
 - 2. Be wary of agreements that set a juvenile up for failure and a later revocation.
- H. Disposition: Detention is a last resort.
- I. Catch-22 Jurisdiction for age 18-21:
 - 1. 9 N.N.C. §1315 (B): "A child shall not be committed or transferred to an adult detention facility."
 - 2. 9 N.N.C. §1315(D): "The Court may exercise jurisdiction over a child until they reach twenty-one (21) years of age if the Court deems it is in the child's best interest."
 - 3. While supervision beyond the 18th birthday to ensure a delinquent child receives rehabilitative services rather than adult criminal prosecution may be in her best interests, detention of a delinquent in an adult detention facility for matters related to delinquency is not within the power of the Family Court under the ABBA, and juvenile detention facilities on the Navajo Nation cannot hold anyone past their 18th birthday. This limits the scope of the Family Court's jurisdiction if a delinquent child is noncompliant after turning 18.

Navajo Rules of Criminal Procedure Timeline Summary

Time(days)	Task	Who	Rule
How to count time	Day of not counted, last day counts unless weekend/holiday, then go to next business day, +5 days for service by mail		3(a)
Arrest +1	Complaint must be filed after arrest w/o warrant or prior complaint	Police	11
Arrest + 18 hours	If weekend/holiday delays filing complaint, administrative bail opportunity must be provided unless reasons to hold, then at next opportunity must go before judge	Dept. of Corrections	17 N.N.C. §1807
Upon filing of criminal complaint	Summons issued	Court	9(a)
Receipt for service +15	Summons must be served or returned with reason why not	Officer serving	9(a)
Arrest +36 hours	Arraignment and bail hearing if bail not administratively offered must be held if in custody	Court	17 N.N.C. §1805
At arraignment	Oral demand for trial by jury	Def.	13
At arraignment	Witness list	Prosec.	25(a)
Arraignment +10	Statements of def. and co-def.'s	Prosec.	25(b)
	List of Experts & reports		
	List of possible exhibits and def.'s property seized		
	List of Criminal history priors to be used at trial		
	List of prior acts intends to use at trial		
	Mitigating/negating material or information		
	Existence of surveillance recordings		
	If search warrant executed		
	If informant involved		25(c)
Arraignment + 15	Written demand for trial by jury or deemed waived	Def.	13, 29(b)
	M Change of Venue	Def. or Prosec.	29(b)
	M relating to conditions of pretrial release		
	M to dismiss for defects in complaint		
	M to amend complaint		
Arraignment +20	Notice of affirmative defenses served to Prosec.	Def.	26(b)
	Witness list in connection with affirmative defenses served to Prosec.		
Req. for Jury +20	Mandatory Pre-Trial Conference	Court	31(d)
Trial – 20	File statement of compliance with disclosure	Prosec.	25(f)
	All discovery motions	Def. or Prosec.	29(c)
	M for severance		
	M to disqualify judge		
	M to name additional witnesses		
	M based on denial of speedy trial		

Navajo Rules of Criminal Procedure Timeline Summary

	All pretrial evidentiary M's including M to suppress		
	M raising lack of mental capacity		
Filing of M + 10	Response from other party		
Trial – 10	M for continuance for good cause shown	Def. or Prosec.	29(e)
Trial - <10	M for continuance only if unforeseeable or exigent circumstances shown and M not unreasonably delayed by moving party		
At close of trial or any time during trial as court directs	File proposed written jury instructions	Any party	NRCP R 48(a)
Before entry of Judgment	M challenging jurisdiction or raising substantive rights secured by law not otherwise referenced by rules	Def.	29(g)
Verdict + 10	M for new trial	Def.	47(a)(2)
Sentencing – 5	PSR submission deadline	Probation	Court practice
Sentencing + 10	M to vacate judgment	Def.	77(b)
Sentencing +20	M to correct unlawful sentence or sentence imposed in unlawful manner	Def.	50(d)
Initial appearance + 7	Revocation hearing shall be held for probation violation if held in jail awaiting	Court	54(e)
IA + 7 to 20	Revocation hearing to be held if probationer/parolee released unless probationer/parolee requests otherwise	Court	55(a)

Navajo Nation Code Sentencing Provisions Summary

(all sentences at court's discretion unless statute states "shall...", then listed as mandatory)

Ch. 1: General Provisions		
Subch. 3: SENTENCING		
17 N.N.C. §§ 220(A) 220(B) 221 224	<p>For ALL OFFENSES:</p> <p>220(A):incarceration always considered extraordinary measure & should be imposed only as a last alternative where def. is found to have caused serious injury to a victim or victims, or other serious circumstances warrant</p> <p>220(B): Alternatives which may include in any combination unless otherwise specified:</p> <ol style="list-style-type: none"> 1. Fine (see §222) 2. Probation (with or without suspended jail time--§224) 3. Rehabilitative treatment after assessment 4. Imprisonment for definite period w/in term authorized 5. Fine and probation OR fine and imprisonment 6. Community service 7. Full or partial restitution or nályééh (to victim or tribe §221(B)) (may be determined thru peacemaking program §221 (C)) 8. Restore harmony between victim and offender or between offender and community 9. Electronic monitoring 10. Pay costs and fees associated with incarceration, electronic monitoring, and probation & parole services <p>221(C) Peacemaker fees</p> <p>221(D) Imposition of peace or security bond, incl. pledges of family or clan sureties</p> <p>221(H) any reasonable condition or sentence which strives to rehabilitate defendant or serves reasonable needs of victims of crime and of society not inconsistent with the sentencing terms est.'d for the offense or offenses committed.</p>	
220(C)	<p>For ALL OFFENSES:</p> <p>AFTER separate civil court proceedings with reasonable doubt standard of proof:</p> <ul style="list-style-type: none"> • forfeiture of property • suspend or cancel a license, • require full or partial restitution, • remove a non-elected public servant or Navajo Nation government employee from office, or • impose any other civil penalty 	
220(D)	Sex Offenses	Sex offender Registration MIN 15 years MANDATORY
220(E)	Sex Offenses under 17 N.N.C. §436-449, 541, 557, & 558	If sex offender subsequently convicted of same or another sex offense: MANDATORY longer jail sentence than for previous conviction
223	all	365 per offense up to 9 YEARS for one incident w/ multiple sentences
225	all	Concurrent or consecutive jail terms for multiple crimes at Court discretion up to 9 YEARS.

Ch. 3: Offenses

Subch. 1: INCHOATE OFFENSES

§17 N.N.C.§	Offense	Jail <ul style="list-style-type: none"> max days unless range or min specified FLAT = No suspension, parole, or probation in lieu of 	Fine (max unless range or min specified)	Alternative or Additional Sentencing Provisions
301(D)	Solicitation	180*	\$500*	*cannot exceed penalty for underlying offense *for solicitation of any offense under Subch. 2 or 7 of Ch. 3, or Subch. 2 of Ch. 6 <ul style="list-style-type: none"> §220(B), §221 & §224
302(F)	Conspiracy	365*	\$5000*	*penalty cannot be penalty for underlying offense *for conspiracy to commit offense under Subch. 2 or 7 of Ch. 3

Subch. 2: OFFENSES AGAINST PERSONS

303(B)	Criminal Homicide	365	\$5000	<ul style="list-style-type: none"> §220(B), §221 & §224
303.01(B)	Manslaughter (enacted 25Jan18)			
304(B)	Kidnapping			
305(C)	Agg Kidnapping			
306(C)	Child Kidnapping			
307(B)	Arson	180	\$2500	
308(B)	Agg Arson	365	5000	
309(B)	Reckless Burning	90	\$2500	
310(B)	Threatening	180	\$500	
311(B)	Unlawful Imprisonment		\$1000	
312(B)	Interference with Custody		\$500	
313(B)	Contrib. to Delinq. of Minor		\$1000	
314(B)	Assault		\$2500	
314.01(B)	Assault upon Peace Officer	90-180 FLAT MANDATORY	\$2500	<ul style="list-style-type: none"> §220(B) & §221 Restitution may be in lieu of mandatory fine
315(B)	Agg Assault	365	\$5000	<ul style="list-style-type: none"> §220(B), §221 & §224
315.01(B)	Agg Assault upon Peace Officer	180-365 FLAT MANDATORY		<ul style="list-style-type: none"> §220(B) & §221
316(B)	Battery	365	\$5000	<ul style="list-style-type: none"> §220(B), §221 & §224
316.01(B)	Battery upon Peace Officer	180-365 FLAT MANDATORY		<ul style="list-style-type: none"> §220(B) & §221
317(B)	Agg Battery	365	\$5000	<ul style="list-style-type: none"> §220(B), §221 & §224 §325 forfeiture if weapon

317.01(B)	Agg Battery upon Peace Officer		365 MIN FLAT MANDATORY		<ul style="list-style-type: none"> • §220(B) & §221 • §325 forfeiture if weapon
318(B)	Stalking	1 st	180	\$500-\$5000	<ul style="list-style-type: none"> • §220(B), §221 & §224 • 2nd+ of offense, jail and/or fine mandatory • Enacted 25 Jan 18
		2 nd +	180-365	\$1000-\$5000	
319(B)	Harassment	1 st	60	\$100-\$250	
		2 nd +	60-180	\$250-\$1000	

Subch. 3: WEAPONS AND EXPLOSIVES					
320(C)	Unlawful Carrying of a Deadly Weapon		180	\$500	<ul style="list-style-type: none">• §220(B), §221 & §224• §325 Forfeiture
321(B)	Unlawful Use of Weapon		90	\$250	
322(B)	Unlawful sale, possession, or transport of explosives	(A)(1)-Not labeled			
		(A)(2)- crime Use intent	180	\$500	
323(B)	Dangerous Use of Explosives		365	\$5000	
324(B)	Negligent Use of Explosives		180	\$2500	
325	Forfeiture of Weapons & Explosives: Upon conviction of any person for violation of any law of the Navajo Nation in which a deadly weapon, dangerous instrument or explosive was used, displayed, or unlawfully possessed by such person, the court SHALL order article forfeited to Navajo Nation and destroyed.				
Subch. 4: THEFT AND RELATED OFFENSES					
330(B)	Theft		180	\$1000	<ul style="list-style-type: none">• §220(B), §221 & §224• 10 yr statute of limitations
		Against NN	365	\$5000	
331(B)	Theft of Services		180	\$1000	<ul style="list-style-type: none">• Amended 6Nov17• §220(B), §221 & §224
		Against NN	365	\$5000	
332(B)	Unauthorized Use of Automobiles or Other Vehicles		180	\$1000	<ul style="list-style-type: none">• §220(B), §221 & §224• §220(B), §221 & §224• 10 yr statute of limitations• Amended 6Nov17
333(B)	Receipt of Stolen Property				
		Against NN	365	\$5000	
334(C)	Shoplifting	≥\$100	90	\$500	<ul style="list-style-type: none">• §220(B), §221 & §224• Fine not to exceed value of goods taken
		<\$100	30	\$100	
335(B)	Fraud		365	\$5000	<ul style="list-style-type: none">• §220(B), §221 & §224• 10 yr statute of limitations• Amended 6Nov17• §220(B), §221 & §224• 10 yr statute of limitations• Enacted 06Nov17
336(B)	Theft by Extortion				
337(B)	Embezzlement Against the Navajo Nation				

Subch. 5: FORGERY AND RELATED OFFENSES					
340(B)	Forgery		365	\$5000	<ul style="list-style-type: none">• §220(B), §221 & §224• 10 yr statute of limitations• Amended 6Nov17
341(B)	Criminal Simulation		90	\$500	
		Against NN	365	\$5000	
342(B)	Obtaining Signature by Deception				
343(B)	Criminal Impersonation		90	\$500	
		Against/of NN	365	\$5000	
344(B)	Misrepresent Navajo-Produced Goods or Products		180	\$1000	<ul style="list-style-type: none">• §220(B), §221 & §224• 10 yr statute of limitations• Enacted 06Nov17
Subch. 6: TRESPASS AND BURGLARY					
350(B)	Criminal Trespass		30	\$100	<ul style="list-style-type: none">• §220(B), §221 & §224
351(B)	Criminal Entry		90	\$250	
352(B)	Trespass with Force/ Violence		365	\$5000	
353(B)	Burglary		180	\$2500	
Subch. 7: BRIBERY AND RELATED OFFENSES					
360(B)	Bribery in Official & Political Matters		365	\$5000	<ul style="list-style-type: none">• §220(B), §221 & §224• §365 Forfeiture of employment• 10 yr statute of limitations• Amended 06Nov17
361(B)	Unlawful Influence in Official & Political Matters				<ul style="list-style-type: none">• §220(B), §221 & §224• §365 Forfeiture of employment only if monetary damage ≥\$1000• 10 yr statute of limitations• Amended 06Nov17
362(C)	Payment or Receipt of Navajo Nation Funds for Services Not Rendered				
363(B)	Making, Authorizing, Permitting, or receiving payment of Navajo Nation funds for products or services not rendered				
364(B)	Abuse of Office				
365	Subch. 7 offense by Navajo Nation employee/non-elected pub. Servant requires MANDATORY forfeiture of present or future NN Employment				

Subch. 8: OBSTRUCTION OF NAVAJO NATION ADMINISTRATION				
370(B)	Obstruction of Justice	365	\$5000	<ul style="list-style-type: none">• §220(B), §221 & §224• 10 yr statute of limitations• Amended 06Nov17
371(C)	Refusing to Aid an Officer	80 HOURS*	\$100	<ul style="list-style-type: none">• §220(B), §221 & §224• *imprisonment for completion of 80 Hours of CSW
372(B)	Rescue from Lawful Custody	180	\$500	<ul style="list-style-type: none">• §220(B), §221 & §224
373(B)	Escape from Lawful Custody			
374(C)	Tampering with Gov't Record	365	\$5000	<ul style="list-style-type: none">• §220(B), §221 & §224• 10 yr statute of limitations• Amended 06Nov17
375(B)	Malicious Criminal Prosecution	90	\$1000	<ul style="list-style-type: none">• §220(B), §221 & §224

376(B)	Falsification		365		\$5000	<ul style="list-style-type: none">• §220(B), §221 & §224• 10 yr statute of limitations• Amended 06Nov17	
377(C)	Unauthorized Practice of Law					<ul style="list-style-type: none">• §220(B), §221 & §224	
Subch. 9: CRIMINAL DAMAGE TO PROPERTY							
380(B) & (C)	Criminal Damage	<\$100			\$100	<ul style="list-style-type: none">• §220(B), §221 & §224• 40 HRS MAX Community Service• Restitution for actual damage	
		>\$100			\$500	<ul style="list-style-type: none">• §220(B), §221 & §224• 80 HRS MAX Community Service• Restitution for actual damage	
381(B)	Littering	1st		30	\$100	<ul style="list-style-type: none">• 40-80 HRS picking up litter may be imposed in lieu of jail/fine	
		2d+		60	\$500	<ul style="list-style-type: none">• 80-160 HRS picking up litter may be in lieu of jail/fine	
383(A)	Desecration of Religious or Traditional Artifacts		365		\$5000	<ul style="list-style-type: none">• §220(B), §221 & §224	
Subch. 10: CONTROLLED SUBSTANCES							
391(B)	Possession of Marijuana	≤1oz	1st		\$100	<ul style="list-style-type: none">• 20 Hrs Max Community Service	<ul style="list-style-type: none">• §220(B), §221 & §224• §395(A) Forfeiture
			2d		\$250	<ul style="list-style-type: none">• 40 Hrs Max Community Service	
		>1oz, <1lb			\$2500	<ul style="list-style-type: none">• 80 Hrs Max Community Service	
		>1lb		365	\$5000	<ul style="list-style-type: none">• §220(B), §221 & §224• §395(A) Forfeiture	
392(C)	Production or Delivery of Marijuana						
393(C)	Delivery of Marijuana to Minors						
394(D), (E)	Possession or Sale of Controlled Substance		365		\$5000	<ul style="list-style-type: none">• §220(B), §221 & §224• Drug Rehab• §395(A) Forfeiture	
395(A)	Any Subch. 10 Offense: marijuana, controlled substance or narcotic forfeited to the Navajo Nation and destroyed or otherwise disposed of.						
Subch. 12: INTOXICATING LIQUORS							
410(B), (C)	Possession of Liquor	1st			\$500	<ul style="list-style-type: none">• §220(B), §221 & §224	
		2d w/in 180 days			\$1000	<ul style="list-style-type: none">• Rehab	
411(D), (E), (F)	Manufacture or Delivery of Alcohol		365		\$5000	<ul style="list-style-type: none">• §220(B), §221 & §224• Tort liability• Civil Forfeiture	
Subch. 13: GAMBLING							
421(C)	Promotion of Unlawful Gambling		é		\$1000	<ul style="list-style-type: none">• forfeiture to NN any/all proceeds & devices obtained thru or used in the activities constituting offense MANDATORY §423	
422(C)	Possession of an Unlawful Gambling Device						
Subch. 14: PROSTITUTION							
431(B)	Prostitution				\$1000	<ul style="list-style-type: none">• §220(B), §221 & §224	
432(B)	Promotion of Prostitution		180		\$1000		

Subch. 15: SEX OFFENSES					
ALL Subch. 15 Offenses			FLAT jail time = NO probation, pardon, parole, commutation, or suspension of sentence or release on any other basis <ul style="list-style-type: none"> • §220(D) = MANDATORY Sex Offender Registration • §220(E) longer sentence for repeat sex offender • On 1st Offense Jail/fine is and/or • For repeat offense Jail/Fine BOTH mandatory 		
436 434(B)	Solicitation of Minor for Prostitution	1st	180 MANDATORY	\$2500 MANDATORY	<ul style="list-style-type: none"> • §220(B), §221 & §224 • §220(D) &(E) • Amended 5/7/18 by CAP-43-18 (changed section numbers)
		2d+	365 MIN FLAT MANDATORY	\$1000 MIN MANDATORY	
437 435(B)	Solicitation Involving Minor in Sexual Contact or Sexual Act	1st	180 MANDATORY	\$2500 MANDATORY	
		2d+	365 MIN FLAT MANDATORY	\$1000 MIN MANDATORY	
438 436(F)	Conspiracy to Coerce Minor to Engage in Sexual Contact or Sexual Act	1st	180 MANDATORY	\$2500 MANDATORY	
		2d+	365 MIN FLAT MANDATORY	\$1000 MIN MANDATORY	
439 437(F)	Kidnapping With Intent to Commit Sexual Contact or Sexual Act	1st	365 MANDATORY	\$5000 MANDATORY	<ul style="list-style-type: none"> • §220(B), §221 & §224 • §220(D) &(E) • Materials forfeited & destroyed on conviction MANDATORY • Amended 5/7/18 by CAP-43-18 (changed section numbers)
		2d+	365 MIN FLAT MANDATORY	\$2500 MIN MANDATORY	
440 438(C) &(D)	Furnishing Sexual Materials to Minors	1st	180 MANDATORY	\$500 MANDATORY	
		2d+	365 MIN FLAT MANDATORY	\$1000 MIN MANDATORY	
441 439(C) & (D)	Displaying Sexual Materials to Minors as Part of Person's Business	1st	180 MANDATORY	\$500 MANDATORY	
		2d+	365 MIN FLAT MANDATORY	\$1000 MIN MANDATORY	
442 440(B)	Public Sexual Indecency	1st	180 MANDATORY	\$500 MANDATORY	<ul style="list-style-type: none"> • §220(B), §221 & §224 • §220(D) &(E) • Amended 5/7/18 by CAP-43-18 (changed section numbers)
		2d+	365 MIN FLAT MANDATORY	\$1000 MIN MANDATORY	
443 441(B)	Sexual Assault	1st	180 MANDATORY	\$5000 MANDATORY	
		2d+	365 MIN FLAT MANDATORY	\$2500 MIN MANDATORY	
443A 441A (B)	Agg Sexual Assault	1st	365 MANDATORY	\$5000 MANDATORY	<ul style="list-style-type: none"> • §220(B), §221 & §224 • §220(D) &(E) • §325 forfeiture if weapon used • Amended 5/7/18 by CAP-43-18 (changed section numbers)
		2d+	365 MIN FLAT MANDATORY	\$2500 MIN MANDATORY	

444 442(C)	Seduction	1st	180 MANDATORY	\$1000 MANDATORY	<ul style="list-style-type: none"> • §220(B), §221 & §224 • §220(D) &(E) • Amended 5/7/18 by CAP-43-18 (changed section numbers)
		2d+	365 MIN FLAT MANDATORY	\$2000 MIN MANDATORY	
445 443(D)	Sexual Exploitation of Minor thru Electronic Communic'n Device	1st	365 MANDATORY	\$5000 MANDATORY	
		2d+	365 MIN FLAT MANDATORY	\$2500 MIN MANDATORY	
446 444(D)	Luring Minor by Electronic Communication Device	1st	365 MANDATORY	\$5000 MANDATORY	
		2d+	365 MIN FLAT MANDATORY	\$2500 MIN MANDATORY	
447 (C)	Possession of Child Pornography	1st	365 MANDATORY	\$5000 MANDATORY	
		2d+	365 MIN FLAT MANDATORY	\$2500 MIN MANDATORY	
448 446(B)	Incest	1st	365 MANDATORY	\$5000 MANDATORY	
		2d+	365 MIN FLAT MANDATORY	\$2500 MIN MANDATORY	
449 447(B)	Sexual Contact or Sexual Act w/ Foster Child or Stepchild	1 st	365 MANDATORY	\$5000 MANDATORY	
		2d+	365 MIN FLAT MANDATORY	\$2500 MIN MANDATORY	
448(C)	Unlawful distribution of sexual images depicting states of nudity or specific sexual activities		365	5000	<ul style="list-style-type: none"> • §220(B), §221 & §224 • Court shall order removal of unlawfully distributed images • No SORNA registration required
Subch. 16: OFFENSES AGAINST THE FAMILY					
451(B)	Bigamy		180	\$1000	<ul style="list-style-type: none"> • §220(B), §221 & §224
452(C)	Adultery				
454(B)	Abandonment of a Child		180	\$1000	
455(B) &(C)	Persistent Nonsupport				<ul style="list-style-type: none"> • §220(B), §221 & §224 • Actual damages for benefit of dependent
456(F)	Endangering Welfare of Minor		90	\$500	<ul style="list-style-type: none"> • §220(B), §221 & §224
Subch. 18: INTERFERENCE WITH JUDICIAL PROCEEDINGS					
471(B)	Influencing a Witness		180 365	\$1000 \$5000	<ul style="list-style-type: none"> • §220(B), §221 & §224 • Amended 11/06/17 by CO-59-17 • 10 year statute of limitations per CO-59-17
472(B)	Receiving a Bribe by a Witness <u>Soliciting or Accepting a Bribe</u>				
473(B)	Influencing a Juror				
474(B)	Receiving a Bribe by a Juror <u>Soliciting or Accepting a Bribe</u>				
475(B)	Jury Tampering				
476(B)	Tampering w/ Physical Evidence				
477(B)	Interfering w/ Judicial Proceedings		180	\$1000	

478(B)	Simulating Legal Process	180	\$1000	• §220(B), §221 & §224
479(B)	Perjury	365	\$5000	

Subch. 19: OFFENSES AGAINST THE PUBLIC ORDER				
481(B)	Unlawful Assembly		\$250	• §220(B), §221 & §224
482(B)	Riot	180	\$1000	
483(B)	Disorderly Conduct	1st	\$100	
		2d w/in 1yr.	\$250	
		3d+ w/in 1yr.	\$500	
484(B)	Obstructing a Highway or Other Public Thoroughfare			• §220(B), §221 & §224 • 80 hrs. MAX community service
485(B)	False Reporting	30	\$500	• §220(B), §221 & §224
486(B)	Criminal Nuisance		\$1000	
487(B)	Abuse of a Human Corpse	180	\$2500	
488(B) & (C)	Public Intoxication	1st	\$100	• 24 hr. safety detention on arrest • §220(B), §221 & §224 • rehab
		2d w/in 1yr.	\$250	
		3d+ w/in 1yr.	\$500	
489(B) & (C)	Inhalation of Toxic Vapors			• 24 hr. safety detention on arrest • §220(B), §221 & §224 • Rehab • 80hrs. MAX community service
Subch. 20: ROBBERY				
491(B)	Robbery	365	\$5000	• §220(B), §221 & §224
492(B)	Armed Robbery	365	\$5000	• §220(B), §221 & §224 • §325 Forfeiture

Subch. 21: FISH AND WILDLIFE VIOLATIONS					
501(B)	Unlawful Taking of Fish or Game	Fish		\$1000	• §220(B), §221 & §224 • §511 Forfeiture • Possible §325 forfeiture
		Birds		\$2000	
		Animals		\$5000	
502(B)(1)	Unlawful Possession of Fish or Game	Fish		\$1000	• §220(B), §221 & §224 • §511 Forfeiture
		:Birds		\$2000	
		Animals		\$5000	
503(B)	Unlawful Taking of Songbirds	30		\$1000	• §220(B), §221 & §224 • §511 Forfeiture • Possible §325 forfeiture
504(B)	Unlawful Taking or Possession of Fur-Bearing Animals			\$1000	
505(B)	Unlawful Taking or Possession of Bald or Golden Eagles			\$5000	
506(B)	Unlawful Taking & Possession of Hawks, vultures and Owls		\$5000		
507(E)	Endangered Species (Unlawful Taking of)		\$5000		
508(B)	Unlawful Taking & Possession of Small Game Animals		\$1000		
509(B)	Destruction of Posted Signs or Structures		\$100		
511	All Subch. 21 Offenses: MANDATORY Forfeiture of fish or game to Court for use of an Indian institution				

Subch. 22: FORESTS AND WOODLANDS VIOLATIONS				
521(B)	Resisting or Obstructing a Forest Officer		\$1000	<ul style="list-style-type: none"> • §220(B), §221 & §224 • 80 Hrs. MAX Community Service
522(B) & (C)	Damage to Geologic & Man-Made Improvements on Navajo Forests or Woodlands		\$2500	<ul style="list-style-type: none"> • §220(B), §221 & §224 • Restitution of actual damages or restoration costs
523(B) & (C)	Fire Violations		\$5000	<ul style="list-style-type: none"> • §220(B), §221 & §224 • 80 Hrs. MAX Community Service • Restitution of full cost of fire suppression &/or fair market value of timber/improvements destroyed/damaged
525(B) & (C)	Unauthorized Harvesting of Timber or Forest Product		\$2500	<ul style="list-style-type: none"> • §220(B), §221 & §224 • 80 Hrs. MAX Community Service • Restitution to Navajo Nation for fair market value of damaged property and/or restoration costs
526(B) & (C)	Unauthorized Occupancy and Use of Navajo Forest Lands			<ul style="list-style-type: none"> • §220(B), §221 & §224 • Removal of unauthorized improvements or payment of full removal costs
527(B) & (C)	Unauthorized Use of Motor Vehicles		\$1000	<ul style="list-style-type: none"> • §220(B), §221 & §224 • Restitution of full restoration cost
528(B)	Violation of Special Closure or Use Restriction Order		\$2500	<ul style="list-style-type: none"> • §220(B), §221 & §224

Subch. 23: CURFEW VIOLATIONS					
531(D)	Curfew Violation	Adult		\$500	<ul style="list-style-type: none">• §220(B), §221 & §224• 80 Hrs MAX Community service
		Child			<ul style="list-style-type: none">• §220(B), §221 & §224• Delinquency MANDATORY• \$1000 civil fine &/or exclusion if child OR parent/guardian of child is non-Indian
532	Damage/destruction of property by child				Parent/guardian liable for costs, attorney’s fees, & restitution
Subch. 24: VIOLENCE AGAINST FAMILY ACT					
538	Notwithstanding any other provision of this subchapter or §220 of this Title, court may impose any reasonable condition to rehabilitate defendant or serve reasonable needs of victims and society & not inconsistent w/ sentencing terms of offense(s) committed. §221 applies. Victim & family must be given opportunity to write victim impact statement & make statement before sentence.				
539(B)	Stalking	1st	180	\$500- 5000	<ul style="list-style-type: none">• §220(B), §221, §224, & §538• Mandatory Jail/fine is “and/or”• Replaced 25Jan18 with §§318-319
		2d+.	180-365 MANDATORY	\$1000- 5000 MANDATORY	
540(B)	Harassment	1st	60	\$100-200	
		2d+	60-180 MANDATORY	\$250-1000 MANDATORY	
541(B) & (C)	Sexual Assault of a Family Member		120-365 MANDATORY	\$1500-5000 MANDATORY	<ul style="list-style-type: none">• §220(D) &(E)• 220(B), §221, §224, & §538• Mandatory Jail/fine is “and/or”
542(B)	Unlawful Imprisonment of a Family Member	1st	180	\$500-\$1000	<ul style="list-style-type: none">• §220(B), §221, §224, & §538• Mandatory Jail/fine is “and/or”• §325 forfeiture if firearm or other deadly weapon involved
		2d+	180-365 MANDATORY	\$2000-\$5000 MANDATORY	
543(B)	Aggravated Assault of Family Member	1st	180	\$1000-\$2500	
		2d+	180-365 MANDATORY	\$2500-\$5000 MANDATORY	
544(B)	Battery of Family Member		365	\$5000	
545(B)	Aggravated Battery against a Family Member		365 MANDATORY	\$1000-\$5000 MANDATORY	
546©	Possession of Firearm	1 st	180	\$500-\$1000	
		2d+	180-365 MANDATORY	\$1000-\$5000 MANDATORY	
547(B)	Trespass with Force or Violence	1 st	180	\$500-\$1000	
		2d+	180-365 MANDATORY	\$1000-\$2000 MANDATORY	
548(B)	Burglary Against Family Member	1 st	180	\$250-\$500	
		2d+	180-365 MANDATORY	\$500-\$1500 MANDATORY	
549(B)	Threatening Family Member	1 st	180	\$250-\$500	
		2d+	180-365 MANDATORY	\$500-\$1500 MANDATORY	
550(B)	Custodial Interference	1 st	180	\$250-\$500	
		2d+	180-365 MANDATORY	\$500-\$1500 MANDATORY	
551(B)	Unlawful Use of Weapon Against Family Member	1 st	180	\$2500	<ul style="list-style-type: none">• §220(B), §221, §224, & §538• Mandatory Jail/fine is “and/or”• §325 forfeiture
		2d+	180-365 MANDATORY	\$5000 MANDATORY	

552(B)	Criminal Entry Involving Family Violence	1 st	60	\$500	<ul style="list-style-type: none"> • §220(B), §221, §224, & §538 • Mandatory Jail/fine is “and/or”
		2d+	60-180 MANDATORY	\$1000 MANDATORY	
553(B)	Criminal Damage Involving Family Violence	1 st	180	\$500	<ul style="list-style-type: none"> • §220(B), §221, §224, & §538 • Mandatory Jail/fine is “and/or” • Restitution for actual damages
		2d+	180-365 MANDATORY	\$500-\$1500 MANDATORY	
554(B)	Violation of Family Violence Court Order (ANY)	1 st	180	\$500-\$1500	<ul style="list-style-type: none"> • §220(B), §221, §224, & §538 • Mandatory Jail/fine is “and/or”
		2d+	180-365 MANDATORY	\$1500-\$5000 MANDATORY	
555(B)	Robbery of Family Member	1 st	180 (MIN)	\$2500	<ul style="list-style-type: none"> • §220(B), §221, §224, & §538 • Mandatory Jail/fine is “and/or” • §325 forfeiture if weapon used
		2d+	180-365 MANDATORY	\$5000 MANDATORY	
556(B)	Conspiracy Against Family Member	1 st	90	\$250-\$500	<ul style="list-style-type: none"> • §220(B), §221, §224, & §538 • Mandatory Jail/fine is “and/or”
		2d+	180-365 MANDATORY	\$500-\$1500 MANDATORY	
557©	Solicitation Against a Family Member	1 st	30-60	\$250	
		2d+	60-180 MANDATORY	\$1000 MANDATORY	
558(B)	Agg Solicitation of Minor Family Member	1 st	60-90	\$500	
		2d+	180-365 MANDATORY	\$2500 MANDATORY	
559(B)	Arson Against Family Member	1 st	180 (MIN)	\$250-\$500	<ul style="list-style-type: none"> • §220(B), §221, §224, & §538 • Mandatory Jail/fine is “and/or” • Restitution for actual damages • Possible §325 forfeiture
		2d+	180-365 MANDATORY	\$500-\$1500 MANDATORY	

Subch. 25: UNAUTHORIZED RECORDING				
603(B)	Transport/Sale of Unauthorized Recording	365	\$5000	<ul style="list-style-type: none">• §220(B), §221, & §224• §608 forfeiture
604(B)	Mislabeling of Recordings	365	\$5000	
605(B)	Unauthorized Recording of Live Performances	365	\$5000	
608	The following are subject to forfeiture: A. All equipment, devices or articles that have been produced, reproduced, manufactured, distributed, dispensed or acquired in violation of the Navajo Nation Unauthorized Recording Act; B. All devices, materials, products and equipment of any kind that are used or intended for use in producing, reproducing, manufacturing, processing, delivering, importing or exporting any item set forth in, and in violation of, the Navajo Nation Unauthorized Recording Act; C. All books, business records, materials and other data that are used, or intended for use, in violation of the Navajo Nation Unauthorized Recording Act; and D. Money or negotiable instruments that are the fruit or instrumentality of the crime.			
Subch. 26: Law Against Human Trafficking				
653(B)	Human Trafficking	365	\$5000	<ul style="list-style-type: none">• §220(B), §221, & §224• Restitution/nályééh to victim• “Prosecution for human trafficking shall not prevent prosecution under any other provision of law when violations of other provisions may be prosecuted from the same circumstances.”• Victim immunity
Ch. 11: Fire Prevention				
Subch. 1: GENERAL				
2702, 2704 (A), 2705	Campfires and smoking prohibited within closed areas		\$500	<ul style="list-style-type: none">• §220(B), §221 & §224• 80 Hrs. MAX Community service• Non-Navajo excluded MANDATORY
	Failure to Obey Warning to remove from closed area			
Subch. 2: NAVAJO NATION FIREWORKS CODE				
2737	Violation of Fireworks Code		\$100	<ul style="list-style-type: none">• §220(B), §221 & §224• 40 Hrs. MAX Community service

TITLE 14: NAVAJO NATION MOTOR VEHICLE CODE					
Chapter 5: Misdemeanor Offenses, Fines, Penalties, Implied Consent					
701	17 N.N.C. §§221-225 applicable				
§14 N.N.C.	Offense		Jail	Fine	Alternative Sentencing
702	Unlawful Flight from Pursuing Law Enforcement Vehicle			\$500	• §220(B), §221 & §224
703(B)	Homicide by Vehicle while violating §707 or §708		MANDATORY MAX	MANDATORY MAX	• §220(B), §221 & §224 • Mandatory BOTH jail/fine
705	Operation of Vehicles on Approach of Authorized Emergency Vehicles				• §220(B), §221 & §224
706	Driver to Exercise Due Care				
707(C-I),	Driving Under Influence of Alcohol/Drugs	1st	24 consec. Hrs.FLAT MIN MANDATORY	\$300 MIN MANDATORY	<ul style="list-style-type: none"> • §220(B), §221 & §224 • MIN FLAT must be served; beyond may be suspended etc. • 8 to 24 Hrs. Community service • Surrender driver's license • Traffic Safety or Alcohol abuse classes or drug rehab • Alcohol/Drug treatment MANDATORY on 3d+ offense • Work release permitted during mandatory jail time if employed
		2d w/in 24mo.	30 FLAT MIN MANDATORY	\$500 MIN MANDATORY	
		3d+ w/in 36mo.	6 months FLAT MIN MANDATORY		
708(B) & (C)	Reckless Driving	1st	10-90 MANDATORY	\$150-370 MANDATORY	<ul style="list-style-type: none"> • §220(B), §221 & §224 • Jail/fine is and/or/or both • Traffic Safety Ed incl. DDC II MANDATORY on 2d+ • 90 days MAX license suspension
		2d+ w/in 24 mo.	20-6 months MANDATORY	\$225-\$500 MANDATORY	
709(B) & (C)	Racing on Highways	1st	90 MANDATORY	\$375 MANDATORY	<ul style="list-style-type: none"> • §220(B), §221 & §224 • Jail/fine is and/or/or both • Traffic Safety Ed incl. DDC II MANDATORY on 1st • 90 days MAX license suspension
		2d+ w/in 24mo.	20-6 months MANDATORY	\$225-\$500 MANDATORY	
710(B)	Driver fail to remain at scene of Accident involving death/personal injury		30-150 MANDATORY	\$500 MANDATORY	<ul style="list-style-type: none"> • §220(B), §221 & §224 • Jail/fine is and/or/or both • Cumulative with other penalty
711(B)	Driver fail to remain at accident involving damage to attended vehicle			\$375 MANDATORY	• §220(B), §221 & §224
722(B)	Yield and due care to blind pedestrian			\$500 MANDATORY	
723(B)	Throwing/Droppping objects at moving vehicles			\$500 MANDATORY	
724(E)	Overtaking/Passing school bus	1 st	Not misd.		Civil assessment fee \$150 MAX
		2d w/in 1yr		\$375 MANDATORY	<ul style="list-style-type: none"> • §220(B), §221 & §224 • Jail/fine is and/or/or both
		3d+ w/in 1 yr after last	60-6 months MANDATORY	\$500 MIN MANDATORY	

Raven Joaquín Attwood, Attorney
OFFICE OF THE NAVAJO PUBLIC DEFENDER
Post Office Box 1186
Tuba City, Arizona 86045
TELE: (928)283-3087

Counsel for Defendant

IN THE DISTRICT COURT OF THE NAVAJO NATION

JUDICIAL DISTRICT OF TUBA CITY, ARIZONA

THE NAVAJO NATION,	]	NO. TC-CR-XXX-2018
]	
Plaintiff,]	
]	
VS.	]	NOTICE OF REQUEST FOR
	]	DISCOVERY
_____ ,]	
]	
Defendant.]	
_____]	

COMES NOW Defendant, through Counsel provides notice to the Court that Defendant has this date submitted a written request to Plaintiff Navajo Nation through the Office of the Prosecutor, to provide discovery to Defendant pursuant to Rule 25, Navajo Rules of Criminal Procedure (1990) to the Defendant within ten (10) days from the date hereof.

RESPECTFULLY SUBMITTED this ____ day of _____, 2018.

Raven Attwood
Counsel for Defendant

CERTIFICATE OF SERVICE

I certify a true copy of this notice was
PERSONALLY DELIVERED to the Prosecutor
on this ____ day of _____, 2018.

BY: _____

[DATE], 2018

OFFICE OF THE PROSECUTOR
Post Office Box 296
Tuba City, Arizona 86045

RE: The Navajo Nation v. DEFENDANT
No(s): TC-TR-XXX-2018

Dear Prosecutor:

I am the court-appointed counsel for the above named Defendant. Please send me legible copies of all police reports, criminal history, statements, photographs, and any other discovery required to be disclosed in accordance with the provisions of Rule 25, Navajo Rules of Criminal Procedure (1990) and applicable law.

Attached hereto is a copy of the Notice of Request for Discovery which was filed with the District Court for each of the cases docketed above.

Your immediate attention and cooperation would be appreciated.

Sincerely,

Raven Attwood
Attorney

Attachment(s): Notice(s) of Request for Discovery

Xc: file/chrono

Raven Joaquín Attwood, Attorney
OFFICE OF THE NAVAJO PUBLIC DEFENDER
P. O. Box 1186
Tuba City, Arizona 86045
Telephone: (928) 283-3087

Counsel for Defendant

DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF TUBA CITY, ARIZONA

THE NAVAJO NATION,]	
	]	NO: TC-CR-____-2018
Plaintiff,]	
]	
vs.]	
	]	DEMAND FOR JURY TRIAL
_____]	
]	
Defendant.]	
_____]	

Defendant _____, through counsel, demands a Jury Trial in the above-captioned action. A defendant in a criminal action in the Navajo Nation courts is entitled, upon demand, to a jury trial. 1 N.N.C. §7. The Navajo Rules of Criminal Procedure in Rule 13(b) and 29(b)(2) provide that a request for a jury trial must be made within fifteen (15) days after arraignment. Defendant was arraigned on [ARRAIGNMENT DATE]; therefore the demand for jury trial is timely.

WHEREFORE, Defendant requests that this court grant his Demand for Jury Trial.

RESPECTFULLY SUBMITTED this ____ day of _____, 2018.

Raven Attwood
Counsel for Defendant

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was personally served upon the Prosecutor's Office this ____ day of _____, 2018.

BY: _____

DISTRICT COURT OF THE NAVAJO NATION

JUDICIAL DISTRICT OF TUBA CITY, ARIZONA

THE NAVAJO NATION,]	
	]	NO: TC-CR-_____-2018
Plaintiff,]	
]	
vs.]	
	]	ORDER FOR JURY TRIAL
_____,]	
]	
Defendant.]	
_____]	

This matter having come before this court upon Defendant's Demand for Jury Trial, the court finds that the Defendant has a right to trial by jury pursuant to the Navajo Bill of Rights, 1 N.N.C. §7 and has made a timely demand for a jury trial pursuant to Rules 13(a) and 29(b)(2) of the Navajo Rules of Criminal Procedure.

IT IS THEREFORE ORDERED that the above cause of action shall be scheduled for a trial by jury.

SO ORDERED this _____ day of _____, 2018.

JUDGE, Navajo Nation District Court

Raven Joaquín Attwood
OFFICE OF NAVAJO PUBLIC DEFENDER
P.O. Box 1186
Tuba City, Arizona 86045
Telephone: (928) 283-3087

Counsel for Defendant

DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF KAYENTA, ARIZONA

THE NAVAJO NATION,]	
]	
Plaintiff,	]	NO: KY-CR-____-2018
]	
vs.]	
]	
_____ ,	]	MOTION TO VACATE BENCH
	]	TRIAL AND RESET
Defendant.	]	PRETRIAL CONFERENCE
_____]	

Defendant _____ (defendant), through counsel, moves this court to vacate the bench trial and reset the matter for a pre-trial conference and as cause states as follows:

1. On [PTC DATE] the above-entitled cause of action was scheduled for a Bench Trial on [TRIAL DATE] at [TIME], on the Navajo Nation's motion for trial.
2. Counsel was appointed for Defendant on [APPOINTMENT DATE]
3. A pre-trial conference is needed to address pre-trial issues in accordance with Nav. R. Cr. P. 31(a)-(d).
4. This request is timely in accordance with Nav. R. Cr. P. 29(e), as it was filed the same day Counsel received the file and more than ten days before trial.
5. This motion is made in good faith and is not intended to unreasonably delay the proceeding, nor will it prejudice the rights of the parties.

Defense counsel therefore requests that the bench trial be vacated and that the case be reset for a pre-trial conference.

RESPECTFULLY SUBMITTED this ____ day of _____, 2018.

Raven Attwood
Counsel for Defendant

CERTIFICATE OF SERVICE

I certify a true copy of this Motion
was mailed to Prosecution on this ____
day of _____, 2018.

BY: _____

DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF KAYENTA, ARIZONA

THE NAVAJO NATION,]	
]	
Plaintiff,	]	NO: KY-CR-_____-2018
]	
vs.]	
]	
_____,	]	ORDER TO VACATE BENCH
	]	TRIAL AND RESET
Defendant.	]	PRETRIAL CONFERENCE
_____]	

This matter came before the court on a Motion to vacate the bench trial and reset it for a pretrial conference. It appears that good cause exists to grant the motion, therefore:

IT IS HEREBY ORDERED that the bench trial scheduled for _____ at _____ P.M. in the above matter is vacated and the case will be reset for a pretrial conference. The Clerk of the Court shall reschedule the hearing to a later date and notify all counsel of record.

DATED this _____ day of _____, 2018.

NAVAJO NATION DISTRICT COURT JUDGE

Raven Joaquín Attwood, Staff Attorney
OFFICE OF NAVAJO NATION PUBLIC DEFENDER
Post Office Box 1186
Tuba City, Arizona 86045
TELE: (928)283-3087

Counsel for Defendant

IN THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF DILKON, ARIZONA

THE NAVAJO NATION,	]	NO. DK-CR-_____-2018
]	
Plaintiff,]	
	]	STIPULATED MOTION
vs.	]	FOR RELEASE WITH
	]	CONDITIONS
_____,]	
]	
Defendant.]	
_____]	

Defendant [DEFENDANT], through counsel, moves the court to release defendant from custody upon a third party release agreement pursuant to 17 N.N.C. §1808 and in support thereof states:

1. Defendant was arrested on a charge of Battery of a Family Member against his girlfriend, [VICTIM NAME], on or about [ARREST DATE]. Defendant failed to appear for Pre-Trial Conference and a bench warrant was issued on [PTC DATE]. Defendant was arrested on the bench warrant on [BW ARREST DATE] and subsequently on [BW APPEARANCE DATE], the court ordered him held without bail until trial.

2. Trial was initially set for [INITIAL TRIAL DATE]. On [CONTINUANCE ORDER DATE], trial was continued upon the court's own motion. Trial was set for [SECOND TRIAL DATE], and Defendant was again

ordered to temporary commitment pending trial. Defendant has now been “temporarily” held for over 111 days.

3. Counsel was appointed for Defendant on [APPOINTMENT DATE]. Trial was again continued, upon the motion of defendant, to afford time to meet with counsel and allow counsel to prepare for trial. The court once again committed Defendant to be held until trial, now set for [THIRD TRIAL DATE].

4. The defendant is presently incarcerated at the Chinle detention facility, where he was sent by the Window Rock Detention facility. The continued detention of the Defendant has made it difficult for legal counsel, whose office is in Tuba City, to meet with Defendant.

5. Rule 15 of the Navajo Rules of Criminal Procedure addresses release prior to trial. Generally, a defendant may be released prior to trial, “unless the judge makes a specific finding that such release will not reasonably assure the appearance of the defendant at trial.” See, Nav. R. Cr. P. 15(a). It is unknown if such a finding was made in this case. The Orders for Temporary Commitment state only that the Court was shown good cause, without specific findings of what that cause is.

4. 17 N.N.C. §1808 provides that “one or two reliable members of the Navajo Nation may execute an agreement agreeing to pay civil penalties if defendant fails to appear for her hearing.”

5. 17 N.N.C. §1808 further provides that the agreement shall be endorsed by a judge or clerk of the court and thereafter filed with the clerk of the court.

6. The purpose of a “bail agreement” is to allow persons to guarantee

the appearance of an accused at trial making themselves liable to pay a civil fine to the court if the accused fails to appear for his hearing or if the third party fails to report to the court any violation of the conditions of release.

7. In this case the defendant requests a third party release to [GUARANTOR 1], his mother, and/or [GUARANTOR 2], his father. The release requested is until the next hearing scheduled in this matter.

WHEREFORE, the defendant requests that the court grant his release with conditions in reliance on the third party release.

RESPECTFULLY SUBMITTED this ____ day of _____, 2018.

Raven Attwood, Esq.
Counsel for Defendant

Concurrence:

Jaime High, Esq.
Navajo Nation Deputy Chief Prosecutor

AGREEMENT FOR 3RD PARTY RELEASE WITH CONDITIONS
Case No.: DK-CR- -2018

I, _____, the undersigned Defendant, in consideration of my temporary release from custody, do hereby acknowledge and agree that I will report to the Dilkon District Court on [HEARING DATE] at [HEARING TIME].

I acknowledge and agree to the following conditions:

_____ Conduct myself as a peaceful and law-abiding citizen; I will not violate any Navajo Nation, state or federal laws;

_____ I will check in with Probation/Parole Services in person or by phone once a week, subject to random testing for alcohol and substance abuse, and follow all Probation/Parole Services conditions for release;

_____ I will not drink alcoholic beverages, smoke marijuana or use any other illegal substance and I will stay away from liquor establishments;

_____ I will not handle any firearms or other weapons;

_____ I will not harass, intimidate, or threaten any witness to this case;

_____ I will reside with _____;
if my residence or contact information changes, I will immediately notify Probation/Parole Services, the Court, defense counsel, and my 3rd party guarantor(s).

_____ I will comply with the court conditions and return for the next scheduled court hearing.

_____ I will notify my 3rd party guarantor(s) before leaving the Navajo Nation for employment, legal, or other business, and upon my return, and let my guarantor(s) know my whereabouts.

I have read this agreement and understand it. I have had an opportunity to ask questions about what it means. I knowingly and freely agree to its terms. I understand that if I violate any term of this agreement, a warrant will be issued for my arrest.

Date

Defendant

I have explained the terms of this agreement to [DEFEDANT].

Date

Defense Counsel

THIRD-PARTY BAIL AGREEMENT
Case No.: DK-CR- -2018

Pursuant to 17 N.N.C. §1808, I

_____, hereby enter into this agreement with the Dilkon District Court on behalf of _____, the defendant in this criminal case. I understand that the defendant is required to comply with certain conditions of release of which he has been apprised, and that defendant is required to appear at all scheduled hearings that the court may require in this case. By signing below, I agree to ensure his compliance with conditions and his return for all noticed hearings. I understand that if the defendant violates any of the conditions of release and I do not report such violations, I will be responsible and must pay a civil penalty of \$_____ [potential civil fine amount not to exceed \$5,000.00 per signatory].

Signature of Third Party

Relationship to defendant: _____.

Address: _____

Telephone No.: _____

Name of Court Clerk or District Court Judge

IN THE DISTRICT COURT OF THE NAVAJO NATION

JUDICIAL DISTRICT OF DILKON, ARIZONA

THE NAVAJO NATION,	]	NO. DK-CR-_____-2018
]	
Plaintiff,]	
	]	ORDER GRANTING
vs.	]	THIRD PARTY RELEASE
]	
_____ ,]	
]	
Defendant.]	
_____]	

THIS MATTER having come before the court upon defendant's motion for third party release, and the court having reviewed and considered said motion FINDS good cause to grant the motion.

NOW THEREFORE, IT IS HEREBY ORDERED that the defendant shall be granted a 3rd party temporary release, with conditions, for the above docketed case and shall be provided notice of her next court hearing (date and time for said case) before her release.

SO ORDERED this _____ day of _____, 2018.

District Court Judge

Raven Joaquín Attwood, Attorney
OFFICE OF THE NAVAJO PUBLIC DEFENDER
Post Office Box 1186
Tuba City, Arizona 86045
Tel. (928) 283-3087

Counsel for Defendant

IN THE DISTRICT COURT OF THE NAVAJO NATION

JUDICIAL DISTRICT OF TUBA CITY, ARIZONA

THE NAVAJO NATION,]	
	]	No: TC -CR-XX7-2018
Plaintiff,]	
]	
vs.]	
	]	MOTION TO COMPEL
_____ ,	]	PROSECUTION TO ELECT
	]	AMONG MULTIPlicitous
Defendant.	]	CHARGES
_____]	

Defendant_____ moves this Court to compel the Prosecution to elect among the multiplicitous charges filed against him, including the above-entitled criminal complaint, TC-CR-XX3-2018, TC-CR-XX4-2018, and TC-CR-XX5-2018. This Motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS & AUTHORITIES

FACTS

1. Defendant has been charged with Battery of a Family Member in violation of 17 N.N.C. §544(A) in docket TC-CR-XX7-2018, and three charges of Endangering the Welfare of a Minor in violation of 17 N.N.C. §456(A)(1), under dockets TC-CR-XX3-2018, TC-CR-XX4-2018 and TC-CR-XX5-2018.

2. The fact section of TC-CR-XX7-2018 reads:

The defendant, [DEFENDANT] after a verbal argument

attacked his spouse namely; [VICTIM NAME].

[DEFENDANT] then physically attacked [VICTIM] in front of their three minor children who were in the bedroom. He started punching her in the face, pulling her hair and dragging her by her hair into the living room. He threw her around some more in the living room and then threw her in the corner by the back door, punched her some more, pulling her hair and slamming her head against the back door.

See Complaint TC-CR-XX7-2018, attached as Exhibit A and by reference incorporated as evidence in support of this motion.

3. The fact section of TC-CR-XX3-2018 reads: “Defendant [DEFENDANT] physically attacked his wife, [VICTIM NAME], in the immediate proximity of the couple’s minor child [INITIALS]. See Complaint TC-CR-XX3-2018, attached as exhibit B and by reference incorporated in support of this motion.

4. The fact section of TC-CR-XX4-2018 reads: “Defendant [DEFENDANT] physically attacked his wife, [VICTIM NAME], in the immediate proximity of the couple’s minor child [INITIALS] (X years old).” See Complaint TC-CR-XX4-2018, attached as exhibit C and by reference incorporated in support of this motion.

5. The fact section of TC-CR-XX5-2018 reads: “Defendant [DEFENDANT] physically attacked his wife, [VICTIM NAME], in the immediate proximity of the couple’s minor child [INITIALS] (X years old).” See Complaint TC-CR-XX5-2018, attached as exhibit D and by reference incorporated in support of this motion.

3. The alleged conduct took place at the same place and time for all complaints. See

Exhibits A thru D.

ARGUMENT

The four complaints are all based upon the same conduct and all but one should be dismissed.

The Indian Civil Rights Act of 1968 at 25 U.S.C. §1302(3), the Navajo Bill of Rights at 1 N.N.C. § 8, and the Navajo Nation's Double Jeopardy Law, 17 N.N.C. §207, provide that an accused person *shall not* be subjected to be twice put in jeopardy for the same offense. (Emphasis Added). Multiple punishments for the same conduct are contrary to Navajo traditional concepts of Fundamental Law. *Navajo Nation v. Kelly*, No. SC-CR-04-05, slip op. at 8 (Nav. Sup. Ct. July 24, 2006).

The test under Navajo Law for double jeopardy is given in *Navajo Nation v. Kelly*. The Navajo Supreme Court held that it could not lightly apply multiple statutory offenses to a defendant's single action. Therefore, prosecutors must be aware that multiple charges arising out of a defendant's single action may not allow multiple convictions, as the offenses charged must clearly resolve separate conduct to not violate a defendant's double jeopardy right. *Id* at 8.

The Diné concept of "double jeopardy" also means that even if the Council creates two separate offenses that clearly punish the same conduct, it cannot nonetheless mandate multiple punishments, even if its intent is clear. *Id* at 8.

The defendant in *Kelly* was convicted of Reckless Driving and Homicide by Vehicle based upon the reckless driving. *Id* at 1. The Court determined that because there was not clear intent to punish separate conduct with the two statutes, the conviction of the lesser offense of Reckless Driving could not stand. *Id* at 10. To further clarify how to determine what constitutes separate conduct, the Court gave a hypothetical example of a

defendant both driving recklessly in violation of 14 N.N.C. §708, and failing to obey a lawful order of a police officer to pull his vehicle over in violation of 14 N.N.C. §700, and specified that these would be separate conduct. *Id* at 8, FN 1.

The charge of Reckless Driving did not have an individual victim, but rather the safety of the general public was at risk, while Homicide by Vehicle had a specific individual victim.

In the present cases the Navajo Nation has charged defendant with one count of Battery of a Family Member against his spouse and three (3) counts of Endangering the Welfare of a Minor, all for the same conduct.

The emphasis in the *Kelly* analysis is not whether there was separate impact or results to victims from the Defendant's conduct, but whether the charges are for separate conduct by the Defendant. In this case, there are four charges all based on the exact same conduct by the Defendant. A single course of conduct affecting multiple individuals is still only a single course of conduct by the Defendant, and therefore cannot be charged in multiple complaints. The Navajo Nation therefore must choose one charge and dismiss the others, rather than being allowed to turn a single transaction into multiple offenses.

WHEREFORE, Defendant requests that the Court require the Prosecution to elect which complaint it will prosecute, and to dismiss the remaining complaints with prejudice.

RESPECTFULLY SUBMITTED this ____ day of _____, 2018.

Raven Attwood
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Motion was hand-delivered to the Prosecutor on this ____ day of _____, 2018.

BY: _____

IN THE DISTRICT COURT OF THE NAVAJO NATION

JUDICIAL DISTRICT OF TUBA CITY, ARIZONA

THE NAVAJO NATION,]	
	]	No: TC-CR-XX7-2018
Plaintiff,]	
]	
vs.]	
]	
_____ ,	]	FINDINGS AND ORDER
]	
Defendant.]	
_____]	

This is a criminal case that comes before the Court on the sole issue of whether the Prosecution should be compelled to elect which of four (4) charges, one (1) of Battery of a Family Member and three (3) of Endangering the Welfare of a Minor it intends to prosecute. The same conduct at the same place and time is alleged in the facts section on all four complaints: TC-CR-XX7-2018, TC-CR-XX3-2018, TC-CR-XX4-2018, and TC-CR-XX5-2018.

Whether the prosecution should be required to elect which offenses it will prosecute depends upon whether prosecution of all the charges would amount double jeopardy.

THE COURT FINDS that it would and directs the prosecution to make its choice as to which charge it intends to prosecute so as to remove the multiplicity of charges for the same conduct.

The double jeopardy clause of the Navajo Bill of Rights, which provides that "no person shall be subject for the same offense to be twice put in jeopardy of liberty, or property," controls this Court's review. 1 N.N.C. §8. Under Navajo Law, double jeopardy, essentially, prohibits the government from subjecting an individual to more than

one prosecution or punishment for the same conduct. *Navajo Nation v. Kelly*, No. SC-CR-04-05, slip op. at 8 (Nav. Sup. Ct. July 24, 2006).

Here, the prosecution accuses Defendant of four crimes, which would, if guilt were proven, subject Defendant to multiple punishments for what appears to be a single course of conduct. This places Defendant in jeopardy more than once for the same offense. The Navajo Nation criminal laws were never intended to permit this type of occurrence. Upon conviction, each charge separately carries different penalties. Whether a court enters concurrent sentences to avoid multiplicitous "punishment" would be immaterial since it is the exposure and risk of the consequence and not the actual consequence which is prohibited. The prosecution must elect between the charges.

IT IS THEREFORE ORDERED that the prosecution shall, within ten (10) days hereof, elect which of the four charges discussed above it intends to prosecute.

IT IS FURTHER ORDERED that such election shall be served upon Defendant and this Court by a notice entitled, "Notice of Election to Prosecute."

SO ORDERED this _____ day of _____, 2018.

JUDGE, District Court of the Navajo Nation

Raven Joaquín Attwood, Attorney
Office of the Navajo Public Defender
Post Office Box 1186
Tuba City, Arizona 86045
Tel. (928) 283-3087

Counsel for Defendant

IN THE DISTRICT COURT OF THE NAVAJO NATION

JUDICIAL DISTRICT OF DILKON, ARIZONA

THE NAVAJO NATION,]	No: TC-CR-____-2018
]	
Plaintiff,]	
]	
vs.]	
]	
	]	MOTION TO COMPEL
	]	PROSECUTION TO ELECT
_____,	]	AMONG MULTIPLICITOUS
	]	CHARGES
Defendant.]	
_____]	

Defendant _____, through counsel, moves this Court to compel the Prosecution to elect among the multiplicitous charges filed in the above-entitled action. This Motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS & AUTHORITIES

FACTS

1. Defendant has been charged with two offenses:

- a. UNLAWFUL CARRYING OF A WEAPON
17 N.N.C. §320(A)
Docket No. DK-CR-516-2017
Facts given in complaint: [facts quoted verbatim from complaint]
- b. POSSESSION OF A FIREARM
17 N.N.C. §546(A)
Docket No. DK-CR-517-2017
Facts given in complaint: [facts quoted verbatim from complaint].

Both causes of action set forth above arise from an incident allegedly occurring at [location given in complaint], on [date of incident], at [time of incident given on complaint]. Copies of the criminal complaints are attached hereto marked Exhibits "A", and "B", and by this reference incorporated herein. These two criminal complaints arise from the same conduct, and therefore violate the prohibition against double jeopardy by seeking to punish Defendant multiple times for the same conduct.

ARGUMENT

The Indian Civil Rights Act of 1968 at 25 U.S.C. §1302(3), the Navajo Bill of Rights at 1 N.N.C. § 8, and the Navajo Nation's Double Jeopardy Law, 17 N.N.C. §207, provide that an accused person *shall not* be subjected to be twice put in jeopardy for the same offense. (Emphasis Added). Multiple punishments for the same conduct are contrary to Navajo traditional concepts of Fundamental Law (*Diné bi beenahaz'áanii*). *Navajo Nation v. Kelly*, No. SC-CR-04-05, slip op. at 8 (Nav. Sup. Ct. July 24, 2006).

In *Kelly*, the Navajo Supreme Court held that "double jeopardy" in the Navajo Bill of Rights must be analyzed with an understanding of the Dine traditional approach to resolving disputes in light of *Diné bi beenahaz'áanii* (Fundamental Laws: Traditional Law, Customary Law, Natural Law, and Common Law), or resolution, as the basis for restoring harmony (*bee hózhó náhodoodleef*). Finality is established when all participants agree that all of the concerns or issues have been comprehensively resolved in the agreement. (*ná bináheezláago bee t'áa łahjį ałgha' deet'á*). *Id* at 6.

The Court interprets double jeopardy in the context of this concept. In the modern context of legislating criminal conduct, conviction and sentencing for a statutory criminal offense resolves an offender's wrongful conduct, or, as more commonly said, "justice is

done.” As the functional equivalent of traditional resolution through an agreement, a conviction and sentencing should be a final resolution of the dispute caused by a defendant’s single action. Multiple charges under multiple statutory offenses for the same action undermine that finality, as conviction for a single offense does not resolve the entire dispute. The *Kelly* Court held that it could not lightly apply multiple statutory offenses to a defendant’s single action. Therefore, prosecutors must be aware that multiple charges arising out of a defendant’s single action may not allow multiple convictions, as the offenses charged must clearly resolve separate conduct to not violate a defendant’s double jeopardy right. *Id* at 8.

The Diné concept of “double jeopardy” also means that even if the Council creates two separate offenses that clearly punish the same conduct, it cannot nonetheless mandate multiple punishments, even if its intent is clear. *Id* at 8. Multiple punishments for the same conduct are contrary to Navajo Fundamental Law.

In the case at bar, the Navajo Nation has charged defendant with two offenses, both of which arise from the same conduct, thereby denying the Defendant her double jeopardy protection precluding multiplicitous charging. The UNLAWFUL CARRYING OF A WEAPON charge, Docket No. DK-CR-516-2017, is multiplicitous with respect to the POSSESSION OF A FIREARM charge, Docket No. DK-CR-517-2017, and vice versa. Both charges stem from the Defendant being found as a passenger in a vehicle with multiple firearms, one of them loaded. As a result, if Defendant was convicted on both of the charges she would be sentenced to multiple punishments for the same conduct.

As in *Kelly*, the two offenses require some, but not all, of the same elements. However, both offenses punish the same conduct by the Defendant. If the Defendant were

faced with defending both of the charges, an impermissible assumption of having to prove her innocence would arise. As a result, this would increase her chances of conviction.

For the reasons set forth above, the charges are multiplicitous and the prosecution must elect one of them rather than being allowed to charge multiple offenses for the same conduct.

WHEREFORE, Defendant requests that the Court require the Prosecution to elect which complaint it will prosecute and to dismiss the remaining complaint with prejudice.

RESPECTFULLY SUBMITTED this ____ day of _____, 2018.

Raven Attwood
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Motion was mailed to the Prosecutor on this ____ day of _____, 2018.

BY: _____

IN THE DISTRICT COURT OF THE NAVAJO NATION

JUDICIAL DISTRICT OF DILKON, ARIZONA

THE NAVAJO NATION,	]	No: DK-CR-____-2018
]	
Plaintiff,]	
]	
vs.]	
	]	FINDINGS AND ORDER
]	
_____,]	
]	
Defendant.]	
_____]	

This is a criminal case that comes before the Court on the sole issue of whether the Prosecution should be compelled to elect which of the two charges: Unlawful Carrying of a Weapon or Possession of a Firearm, it intends to prosecute. Both charges arose out of the same conduct at [LOCATION] on [DATE], at [TIME].

Whether the prosecution should be required to elect which offense it will prosecute depends upon whether prosecution under both the charges would amount to double jeopardy.

This Court finds that it would and directs the prosecution to make its choice as to which of the charges it intends to prosecute.

The double jeopardy clause of the Navajo Bill of Rights, which provides that "no person shall be subject for the same offense to be twice put in jeopardy of liberty, or property," controls this Court's review. 1 N.N.C. § 8. Double jeopardy, essentially, prohibits the government from subjecting an individual to more than one prosecution or punishment for the same offense. Multiple punishments for the same conduct are contrary to Navajo traditional concepts of Fundamental Law (*Diné bi beenahaz'áanii*). Navajo

Nation v. Kelly, No. SC-CR-04-05, slip op. at 8 (Nav. Sup. Ct. July 24, 2006).

Here, two charges arise from the same conduct. Upon conviction, each charge separately carries different penalties. Whether a court enters concurrent sentences to avoid double "punishment" would be immaterial since it is the exposure and risk of the consequence and not the actual consequence which is prohibited. The prosecution must elect either Unlawful Carrying of a Weapon or Possession of a Firearm. It cannot be both.

IT IS THEREFORE ORDERED that the prosecution shall, within ten (10) days hereof, elect which of the two charges discussed above, it intends to prosecute.

IT IS FURTHER ORDERED that such election shall be served upon Defendant and this Court by a notice entitled, "Notice of Election to Prosecute."

SO ORDERED this _____ day of _____, 2018.

JUDGE, District Court of the Navajo Nation

Raven Joaquín Attwood, Attorney
Office of the Navajo Public Defender
Post Office Box 1186
Tuba City, Arizona 86045
Tel. (928) 283-3087

Counsel for Defendant

IN THE DISTRICT COURT OF THE NAVAJO NATION

JUDICIAL DISTRICT OF DILKON, ARIZONA

THE NAVAJO NATION,	]	No: TC-CR-517-2017
]	
Plaintiff,]	
]	
vs.]	
]	
	]	MOTION TO COMPEL
	]	PROSECUTION TO ELECT
MARILYN TEWANEMA,	]	AMONG MULTIPLICITOUS
	]	CHARGES
Defendant.]	
_____]	

Defendant Marilyn Tewanema (hereafter “Defendant”), through counsel, moves this Court to compel the Prosecution to elect among the multiplicitous charges filed in the above-entitled action. This Motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS & AUTHORITIES

FACTS

1. Defendant has been charged with two offenses:

- a. UNLAWFUL CARRYING OF A WEAPON
17 N.N.C. §320(A)
Docket No. DK-CR-516-2017
Facts given in complaint: “Defendant, Marilyn Tewanema was a passenger in a vehicle with possession of the following rifles and pistols;
Smith & Wesson .308 Winchester model M&P-10
Serial # KN02965, Winchester Model 70 300
Winchester rifle, Mossberg 12 gauge shot gun rifle

Serial # U357416, Weatherbee 308. Winchester Vanguard rifle Serial # VR043526, Glock 17 9 mm semi-automatic handgun SN# XV937US and a loaded Revolver pistol located in the middle console of a 2004 Ford Excursion with an Arizona license plate of BLW9447.”

b. POSSESSION OF A FIREARM

17 N.N.C. §546(A)

Docket No. DK-CR-517-2017

Facts given in complaint: “Defendant, Marilyn Tewanema, was stopped for a speeding violation and found to be in possession of a Smith & Wesson .308 Winchester model M&P-10, Winchester Model 70 300 Winchester Rifle, Mossberg 12 gauge shot gun rifle, Weatherbee 308 rifled, Winchester Vanguard rifle, and a .22 Valor revolver pistol fully loaded. A black bag was also found with three magazines loaded with ammunition and some live 12-gauge shot gun shells along with other rifle ammunition. There is a valid Domestic Abuse Protection Order against the Defendant (DK-FC-206/206-17(CV)).”

Both causes of action set forth above arise from an incident allegedly occurring at Mile Post 50 along Navajo Route 15 in Dilkon, Arizona, on September 21, 2017, at 3:19 A.M.. Copies of the criminal complaints are attached hereto marked Exhibits "A", and “B”, and by this reference incorporated herein. These two criminal complaints arise from the same conduct, and therefore violate the prohibition against double jeopardy by seeking to punish Defendant multiple times for the same conduct.

ARGUMENT

The Indian Civil Rights Act of 1968 at 25 U.S.C. §1302(3), the Navajo Bill of Rights at 1 N.N.C. § 8, and the Navajo Nation’s Double Jeopardy Law, 17 N.N.C. §207, provide that an accused person *shall not* be subjected to be twice put in jeopardy for the same offense. (Emphasis Added). Multiple punishments for the same conduct are contrary to Navajo traditional concepts of Fundamental Law (*Diné bi beenahaz’áanii*).

Navajo Nation v. Kelly, No. SC-CR-04-05, slip op. at 8 (Nav. Sup. Ct. July 24, 2006).

In *Kelly*, the Navajo Supreme Court held that “double jeopardy” in the Navajo Bill of Rights must be analyzed with an understanding of the Dine traditional approach to resolving disputes in light of *Diné bi beenahaz’áanii* (Fundamental Laws: Traditional Law, Customary Law, Natural Law, and Common Law), or resolution, as the basis for restoring harmony (*bee hózhó náhódoodleef*). Finality is established when all participants agree that all of the concerns or issues have been comprehensively resolved in the agreement. (*ná bináheezláago bee t’áa łahjį́ ałgha’ deet’á*). *Id* at 6.

The Court interprets double jeopardy in the context of this concept. In the modern context of legislating criminal conduct, conviction and sentencing for a statutory criminal offense resolves an offender’s wrongful conduct, or, as more commonly said, “justice is done.” As the functional equivalent of traditional resolution through an agreement, a conviction and sentencing should be a final resolution of the dispute caused by a defendant’s single action. Multiple charges under multiple statutory offenses for the same action undermine that finality, as conviction for a single offense does not resolve the entire dispute. The *Kelly* Court held that it could not lightly apply multiple statutory offenses to a defendant’s single action. Therefore, prosecutors must be aware that multiple charges arising out of a defendant’s single action may not allow multiple convictions, as the offenses charged must clearly resolve separate conduct to not violate a defendant’s double jeopardy right. *Id* at 8.

The Dine concept of “double jeopardy” also means that even if the Council creates two separate offenses that clearly punish the same conduct, it cannot nonetheless mandate multiple punishments, even if its intent is clear. *Id* at 8. Multiple punishments for the same

conduct are contrary to Navajo Fundamental Law.

In the case at bar, the Navajo Nation has charged defendant with two offenses, both of which arise from the same conduct, thereby denying the Defendant her double jeopardy protection precluding multiplicitous charging. The UNLAWFUL CARRYING OF A WEAPON charge, Docket No. DK-CR-516-2017, is multiplicitous with respect to the POSSESSION OF A FIREARM charge, Docket No. DK-CR-517-2017, and vice versa. Both charges stem from the Defendant being found as a passenger in a vehicle with multiple firearms, one of them loaded. As a result, if Defendant was convicted on both of the charges she would be sentenced to multiple punishments for the same conduct.

As in *Kelly*, the two offenses require some, but not all, of the same elements. However, both offenses punish the same conduct by the Defendant. If the Defendant were faced with defending both of the charges, an impermissible assumption of having to prove her innocence would arise. As a result, this would increase her chances of conviction.

For the reasons set forth above, the charges are multiplicitous and the prosecution must elect one of them rather than being allowed to charge multiple offenses for the same conduct.

WHEREFORE, Defendant requests that the Court require the Prosecution to elect which complaint it will prosecute and to dismiss the remaining complaint with prejudice.

RESPECTFULLY SUBMITTED this __ day of November, 2017.

Raven Attwood
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Motion was mailed to the Prosecutor on this ____ day of November, 2017.

BY: _____

IN THE DISTRICT COURT OF THE NAVAJO NATION

JUDICIAL DISTRICT OF DILKON, ARIZONA

THE NAVAJO NATION,	]	No: DK-CR-517-2017
]	
Plaintiff,]	
]	
vs.]	
	]	FINDINGS AND ORDER
]	
MARILYN TEWANEMA,]	
]	
Defendant.]	
_____]	

This is a criminal case that comes before the Court on the sole issue of whether the Prosecution should be compelled to elect which of the two charges: Unlawful Carrying of a Weapon or Possession of a Firearm, it intends to prosecute. Both charges arose out of the same conduct at Mile Post 50 along Navajo Route 15 in Dilkon, Arizona, on September 21, 2017, at 3:19 A.M.,

Whether the prosecution should be required to elect which offense it will prosecute depends upon whether prosecution under both the charges would amount to double jeopardy.

This Court finds that it would and directs the prosecution to make its choice as to which of the charges it intends to prosecute.

The double jeopardy clause of the Navajo Bill of Rights, which provides that "no person shall be subject for the same offense to be twice put in jeopardy of liberty, or property," controls this Court's review. 1 N.N.C. § 8. Double jeopardy, essentially, prohibits the government from subjecting an individual to more than one prosecution or punishment for the same offense. Multiple punishments for the same conduct are contrary

to Navajo traditional concepts of Fundamental Law (*Diné bi beenahaz'áanii*). *Navajo Nation v. Kelly*, No. SC-CR-04-05, slip op. at 8 (Nav. Sup. Ct. July 24, 2006).

Here, two charges arise from the same conduct. Upon conviction, each charge separately carries different penalties. Whether a court enters concurrent sentences to avoid double "punishment" would be immaterial since it is the exposure and risk of the consequence and not the actual consequence which is prohibited. The prosecution must elect either Unlawful Carrying of a Weapon or Possession of a Firearm. It cannot be both.

IT IS THEREFORE ORDERED that the prosecution shall, within ten (10) days hereof, elect which of the two charges discussed above, it intends to prosecute.

IT IS FURTHER ORDERED that such election shall be served upon Defendant and this Court by a notice entitled, "Notice of Election to Prosecute."

SO ORDERED this _____ day of _____, 2017.

JUDGE, District Court of the Navajo Nation

Raven Joaquín Attwood
OFFICE OF THE NAVAJO PUBLIC DEFENDER
PO Box 1186
Tuba City, Arizona 86045
Tele: (928) 283-3087
Counsel for Defendant

DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF DILKON, ARIZONA

THE NAVAJO NATION,	]	NO. DK-CR-XXX-18
]	
Plaintiff,]	
]	
vs.	]	MOTION TO DISMISS FOR
	]	PROSECUTION OF DE MINIMIS
_____ ,	]	INFRACTION
]	
Defendant.]	

Defendant _____ moves this Court to DISMISS the charge of Criminal Nuisance as a De Minimis Infraction. The nature of Defendant's conduct constituted normally permissible conduct not inconsistent with the purposes of the law defining the offense, did not actually cause or threaten the harm sought to be prevented by the law defining the offense of Criminal Nuisance, or did so to an extent too trivial to warrant the condemnation of conviction, or is so far removed from what would reasonably be considered the crime of Criminal Nuisance that it cannot reasonably be regarded as contemplated by the Navajo Nation Council in forbidding the offense. This motion is supported by the following Memorandum.

MEMORANDUM

Statement of Facts

1. All facts are based upon information in the criminal complaint.
2. On [DATE], at approximately [TIME], Defendant was arrested on a charge of Criminal Nuisance under 17 N.N.C. 486(A)(1), at his parents' home [LOCATION].

3. The language of 486(A)(1) which Defendant is charged with violating is “by conduct either unlawful in itself, he recklessly creates a condition which endangers the safety of others.”
4. The facts in the complaint state:

Defendant, [DEFENDANT], while under the influence of intoxicating liquor, argued with his mother and father. He continued his behavior by shouting at them, and calling them assholes. [DEFENDANT’S MOTHER] advised she called the police because she feared for their safety in the condition [DEFENDANT] was in.

Argument

Criminal proceedings in the Navajo Nation District Courts are governed by the Navajo Nation Code and Navajo Rules of Criminal Procedure. (Nav. R. Cr. P. 1), (it goes without saying that these criminal rules are supported by statutory authorities including the Navajo Bill of Rights.) This motion is made pursuant to the court’s inherent powers.

I. Purpose of 17 N.N.C. §226

17 N.N.C. §226 mandates that:

The Court “*shall* dismiss a prosecution if, having regard to *the nature of the conduct charged* to constitute an offense and the nature of the attendant circumstances, it finds that the defendant’s conduct:

1. Constituted normally permissible conduct not inconsistent with the purpose of the law defining the offense; or
2. Did not actually cause or threaten the harm sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or
3. Is so far removed from what would reasonably be considered a crime that it cannot reasonably be regarded as contemplated by the Navajo Nation Council in forbidding the offense.

17 N. N. C. §226 [Emphasis added].

This statute clearly requires that the Court order the Navajo Nation to dismiss charges when the defendant's conduct *as alleged by the Navajo Nation* does not meet the legal elements of the offense for which the defendant is charged.

In *Navajo Nation v. Platero*, the Navajo Supreme Court opted against usurping prosecutorial authority in application of the *de minimis* rule that Court found implicit in the purpose of the criminal code. *Navajo Nation v. Platero*, 6 Navajo Reporter 422, 426 (Nav. Sup. Ct. 1991). Since that time, however, the Navajo Nation Council added §226, and thereby explicitly required that the Court use its inherent power as a check on prosecutorial and law enforcement over-reach.

§226 authority is a separate tool of the Court from the power to order acquittal when the Navajo Nation fails to prove its case beyond a reasonable doubt. "Every word is powerful, sacred, and never frivolous." *Office of Navajo Labor Relations ex rel. Jones v. Central Consolidated School Dist. No. 22*, 8 Nav. R. 501, 506 (Nav. Sup. Ct. 2004). The Navajo Nation Council would not have included §226 if it was redundant with the evaluation of facts at trial. If the facts alleged by the Navajo Nation do not meet the elements of the crime charged, then the time and expense of a trial requiring them to prove those facts beyond a reasonable doubt is a waste of the Navajo Nation's resources.

The Court must therefore evaluate the facts *as alleged* for the charged offense and make a reasoned determination of law.

II. The definition of Criminal Nuisance

In interpreting the meaning of statutes, principles of Fundamental Law must be applied. First, the plain language of the statute is to be applied, then if language is ambiguous, that ambiguous language must be interpreted in keeping with Navajo

Common Law. *Begay v. Chief*, 8 Nav. R. 654 (Nav. Su. Ct. 2005). Consideration of concepts outside Navajo law must be made in light of *Diné bi beenahaz'ianii. Allen v. Fort Defiance Housing Corp.*, 8 Nav. R. 759 (Nav. Sup. Ct. 2005).

Defendant is charged with Criminal Nuisance under 17 N.N.C. §486(A)(1), a crime against Public Order, the elements of which are: "by conduct either unlawful in itself or unreasonable under all the circumstances, he or she knowingly or recklessly creates or maintains a condition which endangers the safety or health of others." In the Complaint, Defendant is particularly charged with violating this statute as follows: "Defendant by conduct either unlawful in itself, he recklessly creates a condition which endangers the safety of others."

"Conduct" is defined as "an action or omission and its accompanying state of mind, or, where relevant, a series of acts or omissions; 17 N.N.C. §209(C). "Knowingly" with respect to a result of his conduct means "aware or believes that his conduct is substantially certain to cause the result." 17 N.N.C. §210(B)(3). "Recklessly" with respect to conduct requires that "he or she is aware of a risk that the result will occur but disregards the risk. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that a reasonable person would exercise in such a situation." 17 N.N.C. §210(C)(2). No definition of "condition" is provided in Title 17.

The meaning of "Nuisance" in the criminal code is informed by the meaning of the term in the civil context. At Anglo common law, "nuisance" may be defined as

"the unreasonable, unwarranted and/or unlawful use of
property, which causes inconvenience or damage to
others, either to individuals and/or to the general public.

Nuisances can include noxious smells, noise, burning, misdirection of water onto other property, illegal gambling, unauthorized collections of rusting autos, indecent signs and pictures on businesses and a host of bothersome activities. Where illegal they can be abated by criminal or quasi-criminal charges. If a nuisance interferes with another person's quiet or peaceful or pleasant use of his/her property, it may be the basis for a lawsuit for damages and/or an injunction ordering the person or entity causing the nuisance to desist or limit the activity."

See dictionary.law.com.

Nuisance as referring to the condition created on a person's property is used with this meaning numerous places in Navajo statutes. (See *E.g.* disposal of waste "in a manner as not to become a nuisance," 13 N.N.C. §616(A); mobile home park sewage disposal facilities "shall be located where they will not create a nuisance or health hazard," 13 N.N.C. §1504(C); Nuisance: No animal owner or keeper shall harbor, maintain or permit on any lot, parcel of land or premise under his control, any dog or other animal which by any sound or cry shall disturb the peace and comfort of the inhabitants of the neighborhood or interfere with any person in the reasonable and comfortable enjoyment of life or property." 13 N.N.C. §1708.

For a nuisance to rise to the level of criminal activity, the conduct creating it *must* be unlawful or "unreasonable under all the circumstances." In the present complaint, Navajo Nation alleges that Defendant's conduct was unlawful. "Unlawful" means contrary

to law or, where the context so requires, not permitted by law; it does not mean immoral.”
17 N.N.C. §209(Z).

Criminal Nuisance is classified as an offense against Public Order. One’s conduct while in one’s home or, for that matter, one’s family’s home, is not public behavior unless it affects the public in some way. A private residence is a place in which an individual “normally expects privacy free of government intrusion.” *United States v. Karo* 468 U.S. 705, 714.

[DEFENDANT] did not engage in unlawful conduct. The conduct which appears in the report to have concerned both the complainant and the officer was his intoxicated state and his use of foul and disrespectful language. Unlawful use of language, such as threatening, is properly charged under the appropriate statute. Based upon the facts in the complaint, Defendant did not threaten his parents with his words. He insulted them and was disrespectful. Using foul language in speaking with one’s family members is certainly disagreeable and rude, and arguably immoral, but there are times and circumstances when it may not be unreasonable. Being intoxicated in the privacy of home, unlike public intoxication, is not an offense under the Navajo Law and Order Code.

AS A MATTER OF LAW, The Defendant’s behavior did not “create or maintains a condition which endangers the safety or health of others.” It is implied in the meaning of “nuisance” that the “condition” to which the statute refers is a physical one in the property or land. The complaint states that [DEFENDANT’S MOTHER] called police because she was fearful of [DEFENDANT]’s intoxicated state. Even if somewhat disruptive to the harmony of the family and home, being intoxicated and using foul language in the privacy of one’s home, by itself, does not rise to the level of a criminal nuisance.

Social consequences within the family are outside of the legal meaning of criminal nuisance. Criminal Nuisance is an offense against *public order*, alongside such offenses as Unlawful Assembly, 17 N.N.C. §481, Riot, 17 N.N.C. §482, Disorderly Conduct, 17 N.N.C. §483, Obstructing a Highway or Other Public Thoroughfare, 17 N.N.C. 484., and Public Intoxication, 17 N.N.C. §488 . If it was meant to encompass private conduct within the family, it would have been placed in Subchapter 17 or Subchapter 24.

Had Defendant been found in an intoxicated state in public, he would have been subject to 17 N.N.C. §488, the most severe penalty for which does not include incarceration and has a maximum fine which is half of that for Criminal Nuisance.

III. Habitual improper use of the Criminal Nuisance statute

Criminal Nuisance is currently used by law enforcement as a “catch-all” charge used as a pretense to arrest an individual whose behavior has not actually violated Subchapter 24, but whose family members have stated that they do not want the individual in the home at that time, or as a multiplicitous pile-on charge added to other conduct engaged in within the home while intoxicated. Probable cause to arrest is predicated upon commission of a crime, not inconvenience to a person’s family members, particularly when the person is in the home where he has a right to be coequal with that of others in his family who also live in the home.

Had the Navajo Nation Council intended to make alcohol intoxication within one’s home an offense, they would have done so, and set an appropriate penalty. Punishment of being intoxicated in the privacy of one’s home is not the intended purpose of 17 N.N.C. §486, and it is an abuse of police and prosecutorial discretion to treat it as such.

Conclusion

AS A MATTER OF LAW, Defendant's conduct on [DATE], *as alleged by the Navajo Nation* was not unlawful conduct under the law. Being intoxicated and foul-mouthed within the privacy of home is rude and immoral behavior; it is not, however, the type of conduct intended to be controlled by the *criminal* nuisance statute.

Defendant's conduct on [DATE] *as alleged by the Navajo Nation* is so far removed from what would reasonably be considered the crime against Public Order of Criminal Nuisance that it cannot reasonably be regarded as contemplated by the Navajo Nation Council in forbidding the offense. This is evident from the more serious sentencing provisions for Criminal Nuisance compared to the offense of Public Intoxication. The Defendant's alleged conduct does not meet the legal elements of Criminal Nuisance.

WHEREFORE, defendant requests that this Court dismiss complaint DK-CR-XXX-18.

RESPECTFULLY SUBMITTED this ____ day of _____, 2018.

Raven Attwood
Legal Counsel for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing
was mailed to the Prosecutor's office
on this ____ day of _____, 2018.

BY:_____

IN THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF DILKON, ARIZONA

THE NAVAJO NATION,]	NO: DK-CR-XXX-18
]	
Plaintiff,]	
]	
vs.]	
]	
_____ ,	]	FINDINGS AND ORDER
]	
Defendant.]	
_____]	

This is a criminal case that comes before the Court on the issue of whether to dismiss the charge of Criminal Nuisance against Defendant [DEFENDANT] arising from his conduct on [DATE], at approximately [TIME], at [LOCATION].

Defendant has asked for dismissal of this prosecution based upon 17 N.N.C. §226 as a De Minimis Infraction. This section requires in part (B) that “the court shall not dismiss a prosecution under this section without filing a written statement of its reasons.”

A prosecution shall be dismissed under §226 if it finds that the defendant’s conduct “(1) Constituted normally permissible conduct not inconsistent with the purpose of the law defining the offense; or (2) Did not actually cause or threaten the harm sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or (3) Is so far removed from what would reasonably be considered a crime that it cannot reasonably be regarded as contemplated by the Navajo Nation Council in forbidding the offense.”

The facts are reviewed here in the light most favorable to the Prosecution.

Here, the prosecution accuses Defendant of Criminal Nuisance under 17 N.N.C. §486(A)(1), an offense against the Public Order committed when a person by

conduct either unlawful in itself or unreasonable under all the circumstances, knowingly or recklessly creates or maintains a condition which endangers the safety or health of others. Here, Defendant was intoxicated and used foul language in speaking to his parents.

AS A MATTER OF LAW, Defendant's conduct on [DATE], *as alleged by the Navajo Nation* was within normally permissible conduct under the law. Simply being intoxicated within the privacy of one's own home is rude and immoral behavior; it is not, however, the type of conduct intended to be controlled by the Criminal Nuisance statute. Likewise, using foul language is strongly frowned upon in Navajo social mores, but is not of itself criminal behavior and may, under some circumstances, be reasonable. [DEFENDANT]'s conduct on [DATE] *as alleged by the Navajo Nation* is so far removed from what would reasonably be considered the crime against Public Order of Criminal Nuisance that it cannot reasonably be regarded as contemplated by the Navajo Nation Council in forbidding the offense. Even if the Prosecution proves at trial that the defendant's conduct was exactly what it is alleged in the complaint to have been, this conduct does not meet the legal elements of Criminal Nuisance.

IT IS THEREFORE ORDERED that the prosecution of Criminal Nuisance against Brent Begay is dismissed with prejudice and Case No. DK-CR-XXX-18 is closed.

SO ORDERED this _____ day of _____, 2018.

JUDGE, District Court of the Navajo Nation

Raven Joaquín Attwood, Attorney
OFFICE OF THE NAVAJO PUBLIC DEFENDER
P. O. Box 1186
Tuba City, Arizona 86045
Telephone: (928) 283-3087

Counsel for Defendant

DISTRICT COURT OF THE NAVAJO NATION

JUDICIAL DISTRICT OF KAYENTA, ARIZONA

THE NAVAJO NATION,]	NO: KY-CR-_____-2018
]	
Plaintiff,]	
]	
vs.	]	MOTION FOR EXAMINATION
]	
_____,]	
]	
Defendant.]	
_____]	

Defendant, _____, through counsel, moves this court pursuant to Rule 19(b), Navajo Rules of Criminal Procedure for an examination to determine whether Defendant is competent to stand trial and to investigate his mental condition at the time of the offense.

Counsel was appointed for Defendant on [APPOINTMENT DATE].

On [CONTACT DATE], Defendant's mother, [MOTHER], contacted counsel Raven Attwood and informed him that the Defendant is disabled and that she submitted the application for appointment of counsel on his behalf.

Rule 19(a), Navajo Rules of Criminal Procedure provides that a person shall not be tried, convicted, sentenced or punished for an offense while, as a result of mental

illness or defect, he is unable to understand the proceedings against him or to assist in his own defense.

On [INTERVIEW DATE], Defense Counsel interviewed the Defendant, along with Defendant's sister [SISTER]. Defendant and his sister report that Defendant is unable to read and write, although he graduated from high school with a special education diploma. Defendant would often nod and agree if asked a "yes or no" question about whether he understands something, but when asked could not explain to counsel what a judge does, what a prosecutor does, or what a trial is. Defendant mixed up the numbers in the year when asked his birthdate, and also mixed up the digits when asked for his phone number.

Defendant's sister reported that defendant's mother has decision making power over much of Defendant's affairs and Defendant is on social security disability.

Defendant's mother in a phone conversation on [CONVERSATION DATE] confirmed that Defendant receives social security disability because he has a learning disability and intellectual disability ("mentally retarded"), as well as [OTHER HEALTH IMPAIRMENT].

Defendant and his mother brought his school records to Defense Counsel on [DATE]. These records confirm that Defendant is mentally impaired and was enrolled in special education throughout his school years. Based upon Defense Counsel's interview of Defendant, and information provided by Defendant's family members, Defense Counsel is concerned that Defendant is not competent to stand trial, lacks the understanding to knowingly and intelligently waive his rights to enter any plea

agreement or deferred prosecution agreement, and may be unable to fully assist in his own defense for reasons of “mental defect.”

WHEREFORE, Defendant respectfully requests this court grant his Motion for Examination.

SUBMITTED THIS _____ day of _____, 2018.

Raven Attwood
Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a true copy of this Motion was mailed and emailed to the Prosecutor on this _____ day of _____, 2018.

BY: _____

DISTRICT COURT OF THE NAVAJO NATION

JUDICIAL DISTRICT OF KAYENTA, ARIZONA

THE NAVAJO NATION,	]	<u>NO: KY-CR- -2018</u>
]	
Plaintiff,]	
]	
vs.	]	ORDER FOR EXAMINATION
]	
_____,']	
]	
Defendant.]	
_____]	

This matter has come before the court on Defendant's Motion for Examination. It appears good cause exists to grant the motion.

IT IS HEREBY ORDERED that Defendant be examined by a competent licensed psychologist, neuropsychologist, or other medical professional capable of evaluating whether Defendant is competent to understand the proceedings against him and to investigate his mental condition at the time of the alleged offense.

IT IS FURTHER ORDERED that any reports of the evaluation shall be submitted first to Counsel for Defendant who shall review same and redact from them any statement or summary of statements made by Defendant concerning the offense charged. Thereafter Counsel for Defendant shall immediately forward said reports to the Prosecutor.

SO ORDERED this _____ day of _____, 2018.

JUDGE, District Court of the Navajo Nation

Raven Attwood, Attorney
OFFICE OF THE NAVAJO PUBLIC DEFENDER
Post Office Box 1186
Tuba City, Arizona 86045
Tel. (928) 283-3087

Counsel for Defendant

IN THE DISTRICT COURT OF THE NAVAJO NATION

JUDICIAL DISTRICT OF KAYENTA, ARIZONA

THE NAVAJO NATION,	]	No: KY-CR-____-2018
]	
Plaintiff,]	
]	
vs.	]	MOTION TO DISMISS
	]	FOR FAILURE TO
_____ ,	]	PRODUCE MANDATORY
	]	DISCLOSURES UNDER RULE 25
Defendant.]	
_____]	

Defendant [NAME], through counsel, moves this Court to dismiss the present action as sanction for failure by the Navajo Nation to make mandatory disclosures required under Rule 25 of the Navajo Rules of Criminal Procedure. This Motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS & AUTHORITIES

FACTS

1. The above-docketed complaint was served upon Defendant on [DATE OF SERVICE OF SUMMONS].
2. Arraignment was held on [ARRAIGNMENT DATE]. At that time, the Court ordered the Navajo Nation to comply with Rule 25 without further orders from the court, and to submit a Statement of Compliance within 10 days of the Order.
5. The Tuba City Office of the Public Defender was appointed as counsel for Defendant on [ORDER OF APPOINTMENT DATE]. Counsel for Defendant received the file the same day.

6. Defense counsel served a Request for Discovery and Notice to the court of same to the Navajo Nation, by mail on [DATE DISCOVERY REQUEST SENT].

7. To defense counsel's knowledge, the Navajo Nation has not filed a "Statement of Compliance" pursuant to Nav. R. Cr. P. Rule 25(f), as none was provided with the file by the court, and none has been served upon Counsel by the Navajo Nation.

8. As of the writing of this motion, defense counsel has received no discovery from the Navajo Nation.

ARGUMENT

Under the Navajo Bill of Rights at 1 N.N.C. §§3 and 7, and the Indian Civil Rights Act, at 25 U.S.C. §§1302(a)(6) and 1302(a)(8), the defendant is entitled to a fair trial conducted in accordance with due process of law. Further, pursuant to Navajo case law, the defendant is entitled to "full and complete justice". *Navajo Nation vs. Jones*, 1 Nav.R. 14, 18 (Nav. Sup. Ct. 1971).

1. Timely disclosure was not made.

Rule 25(b)(1)-(6) of the Navajo Rules of Criminal Procedure specifically requires the Navajo Nation to provide certain items of discovery to the Defendant no later than ten (10) days after arraignment. These items of discovery include but are not limited to: 1) all statements of defendant; 2) scientific tests and physical examinations (medical reports); 3) lists of all papers, documents, photographs connected with the case; 4) listing of prior convictions of defendant to be used at trial; 5) list of defendant's prior acts which the prosecutor intends to use to prove motive, intent, or knowledge; 6) material which tends to mitigate or negate the defendant's guilt as to the offense charged, or which would tend to reduce his punishment, including the criminal history of witnesses against him. Nav. R. Cr. P. 25(b). As a matter of practicality, when a defendant is represented by counsel, the Office of the Public Defender treats the Rule 24(b) deadline as effective with respect to the date of the request for discovery made by counsel, in

order to give the Navajo Nation a reasonable amount of time in which to provide discovery materials to defense counsel.

The deadline for disclosure ten (10) days after the [ARRAIGNMENT DATE] arraignment in accordance with Rule 25, plus five additional days due to service by mail in accordance with Rule 3(a) Nav. R. Cr. P., was [DEADLINE]. The Navajo Nation did not make the mandatory disclosures within the time allowed, nor was a Statement of Compliance filed with the Court.

2. The Navajo Nation has violated the rights of the Defendant by failing to make mandatory disclosures.

Among the rights guaranteed to a defendant by the Navajo Bill of Rights and the Indian Civil Rights Act is the right to the assistance of counsel. 1 N.N.C. §7; 25 U.S.C. §1302(6). This means that he is entitled to *effective* assistance of counsel. *Navajo Nation v. McDonald*, 6 Nav. R. 432, 436 (Nav. Sup. Ct. 1991) (emphasis added). This right is also guaranteed by the Navajo common law. *Id.* at 436. One of the main requirements for effective assistance of counsel under the Navajo common law, which is a higher standard than that required by the Indian Civil Rights Act, is that defense counsel must “speak wisely and with knowledge.” *Id.* at 436. In order for counsel to speak wisely and with knowledge, he must first conduct careful factual and legal investigations and inquiries with a view to developing matters of defense. To do so is impossible if mandatory disclosures are not made.

Rule 25 (e) Nav. R. Cr. P. entitled Extent of Prosecutor’s Duty to Obtain Information states that:

The prosecutor’s obligation under this Rule extends to material and information in the possession or control of members of his staff and of any other persons who have participated in the investigation or evaluation of the case and who are under the prosecutor’s control.

Emphasis added.

This Rule imposes an active duty upon the prosecutor to obtain and turn over discovery information to the defense. It is not enough to say that information is not in the prosecutor's file or office. Rule 25 (e) states that if the government has "possession or control" it must obtain it and disclose it to the defense. Police and all who participated in the arrest and investigation of the charges against the defendant fall within the prosecutor's control. See Rule 25(b) and Rule 25 (e) Nav. R. Cr. P.. Anything less reduces discovery only to information the government wants to use to convict the defendant.

The complaint filed against [DEFENDANT] contain serious allegations that can have severe consequences for him. The information the Navajo Nation has failed to disclose is needed to enable [DEFENDANT] and his counsel to properly exercise the defendant's rights of confrontation and cross-examination, and to give meaning to his right to present a defense at a fair trial.

3. Delayed disclosure violates the Defendant's right to a speedy trial.

The Navajo Nation Bill of Rights and the Indian Civil Rights Act give the Defendant a right to a "speedy and public trial." 1 N.N.C. §7; 25 U.S.C. §1302(a)(6). There are four factors to be applied by the Court in considering whether a particular delay is a violation of a Defendant's speedy trial right: "1) the length of the delay, 2) the reason for the delay, 3) the defendant's assertion of the right, 4) the prejudice to the defendant caused by the delay." *Seaton v. Greyeyes*, No. SC-CV-04-06, slip op. at 5 (Nav. Sup. Ct. 2006).

Here, analysis of the length of delay is difficult because defense counsel has no way to know whether additional disclosures, depositions, or pretrial evidentiary motions will be needed, as these decisions are usually made based upon information provided in the mandatory disclosure material. However, delay in mandatory disclosure may result

in a delay of trial in order to provide more time for counsel to prepare an effective defense.

The reason for delay in this case is the Navajo Nation's failure to make timely mandatory disclosures. This delay creates a "catch-22" in which either the defendant's right to a speedy trial is compromised, or else the defendant's rights to effective assistance of counsel and to cross-examine the evidence and witnesses against his must suffer.

With respect to the third factor, the defendant with this motion asserts and preserves his right to a speedy trial.

With respect to the fourth factor, the prejudice to the defendant caused by the delay is significant, particularly as there has been no delay caused by the conduct of the Defendant. In *Seaton v Greyeyes*, the court distinguished between problematic and non-problematic continuances. One or two routine continuances in order to prepare cases for trial were not problematic. In *Seaton*, problematic continuances included: because the Department of Corrections failed to transport the Defendant to court; because the Defendant's attorney failed to appear and did not file a Motion for Continuance; and because the Guardian Ad Litem for the alleged victim in that case asked for more time to inform the court of the alleged victim's position. *Id.* at 6.

A continuance which is completely avoidable by due diligence on the part of the prosecutor, defense attorney, or Court is problematic. Here, there have been no delays due to the Defendant's conduct or continuances asked for by the Defendant. Given the promptness with which the Defendant requested and met with counsel, a continuance to have more time for the Defense to prepare his case has been necessitated *entirely* by the failure of the Prosecutor to make timely mandatory disclosure.

Delay because of the Navajo Nation's failure to make timely disclosure *does* prejudice the defendant's right to a speedy trial.

4. Dismissal is the most appropriate sanction in this case.

Rule 28(a) of the Navajo Rules of Criminal Procedure states:

If at any time during the course of the proceeding it is brought to the attention of the court that a party has failed to comply with any provisions of this Rule or any order issued pursuant thereto, the court may impose any sanction which it finds just under the circumstances, *including but not limited to:* (1) Ordering disclosure of the information not previously disclosed; (2) granting a continuance; (3) Holding a witness, party, or counsel in contempt; (4) Precluding a party from calling a witness, offering evidence, or raising a defense not disclosed; and (5) Declaring a mistrial when necessary to present a miscarriage of justice.

(Emphasis added).

In the present matter, dismissal of the charge with prejudice is the most appropriate sanction.

An Order to Compel Disclosure would be redundant as this Court already ordered the Navajo Nation to comply with Rule 25 in the Order issued at the time of arraignment on October 12, 2017. This order is part of the standard language in every order issued at arraignment where a defendant has pled Not Guilty. Standard language does not mean the order is mere form without substance. The Navajo Nation has also disregarded the reminder provided by defense counsel in the Request for Discovery filed with a Notice of same to the Court on [DATE DISCOVERY REQUEST SENT].

An Order to Compel would also not preserve all of the Defendant's rights, as the Defendant's right to a speedy trial could be compromised. Granting a further continuance would likewise compromise the Defendant's right to a speedy trial.

Holding the Navajo Nation or the prosecutor assigned to Kayenta District Court in contempt would not preserve the Defendant's rights, and would be a

disproportionately punitive measure under the circumstances.

Precluding the Navajo Nation from using any evidence not disclosed might undermine the prosecution's case, but would likewise leave the defendant in the dark in a manner prejudicial to her rights, particularly if any of the mandatory disclosure information is exculpatory.

Finally, declaring a mistrial would not be a timely remedy at the pretrial stage of proceedings, while dismissal without prejudice would serve no purpose but to reward the Navajo Nation with the opportunity to start over and correct their errors in due process, while burdening the Defendant with prolonged involvement with the criminal court proceedings and a need to seek assistance of counsel a second time.

In *Acothley v Perry*, the Navajo Supreme Court stated that dismissal is not mandatory upon violation of discovery and pretrial time requirements. *Acothley v. Perry*, No. SC-CV-08-11, slip. op. at 4 (Nav. Sup. Ct. 2011). In *Acothley*, the Court balanced the due process rights of the criminal defendants against the rights of public justice “*in light of the extraordinary circumstances*” created by “the simultaneous filings of numerous cases, the subsequent *en masse* jury demands in separate jury trials, and the prosecutorial burden placed upon a single Special Prosecutor” in the Discretionary Fund Cases. *Id.* at 5 and 8.

The present case may be distinguished from *Acothley* by the utter lack of “extraordinary circumstances” surrounding it. To the contrary, failure to make timely disclosure is business as usual for the Navajo Nation Office of the Prosecutor. Judicial notice may be taken of the staffing challenges of the Office of the Prosecutor. However, Prosecutor staffing difficulties are a seemingly never-ending problem in the Navajo Nation, and were found to be an unacceptable reason for delays in 1979. 2 Nav. R. 131 at 138. Nothing in more recent case law surrounding extraordinary circumstances suggests otherwise.

While dismissal is not mandatory, it *is* within the discretion of this Court as the sanctions the court may impose under Rule 28(a) are “not limited to” those numerated. Nav. R. Cr. P. 28(a). In the most recent Navajo Supreme Court case addressing Rule 25, the denial of a motion to dismiss based upon Rule 25 was found not to be abuse of discretion. *Navajo Nation v Tso* No. SC-CR-03-16, slip op at 8 (Nav. Sup. Ct. 2016). In *Tso*, the defendant did not raise Rule 25 concerns until the day of trial, and while not timely, disclosures *had* been made. *Id* at 8.

In the present case, the defendant’s motion is timely and no disclosure whatsoever has been made. It may be argued that dismissal on technical grounds is not favored in Navajo court. *Black v Bigman*, 8 nav. R. 177,180 (Nav. Sup. Ct. 2001). However, it is unacceptable to place either the Defendant or the Court in the position of having to choose which rights of the Defendant are to be protected when the Navajo Nation could have prevented any prejudice to the Defendant’s rights by making timely mandatory disclosures. *Bigman* was a civil fraud case. *Id*. Rights of criminal defendants under the Navajo Bill of Rights are not mere technicalities, and public justice is poorly served by routinely allowing Prosecutors to trample them. Dismissal with prejudice therefore is the most appropriate sanction available to the court in this case.

WHEREFORE, Defendant requests that the Court dismiss this action with prejudice.

RESPECTFULLY SUBMITTED this _____ day of _____, 2018.

Raven Attwood
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Motion was hand-delivered to the Office of the Prosecutor on this _____ day of _____, 2018.

BY:_____

IN THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF KAYENTA, ARIZONA

THE NAVAJO NATION,]	NO: KY-CR-____-2018
]	
Plaintiff,]	
]	
vs.	]	ORDER FOR DISMISSAL
	]	(WITH PREJUDICE)
_____ ,]	
]	
Defendant.]	
_____]	

THIS MATTER having come before the court on Defendant's Motion to Dismiss for Lack of Mandatory Disclosure by Navajo Nation under Rule 25, Nav. R. Cr. P., the court finds that the Navajo Nation has violated the Defendant's rights under the Navajo Bill of Rights at 1 N.N.C. §§3 and 7.

The Court also finds that any other sanction available under Rule 28(a), Nav. R. Cr. P. would either fail to preserve these rights of the Defendant, or else result in delay which would impermissibly violate the Defendant's right to a speedy trial under 1 N.N.C. §7.

IT IS THEREFORE ORDERED that the above-entitled action is dismissed with prejudice.

SO ORDERED this _____ day of _____, 2018.

JUDGE, District Court of the Navajo Nation

Raven Joaquín Attwood, Attorney
OFFICE OF THE NAVAJO PUBLIC DEFENDER
PO Box 1186
Tuba City, Arizona 86045
Tele: (928) 283-3087
Counsel for Defendant

DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF KAYENTA, ARIZONA

THE NAVAJO NATION,]	NO. KY-CR-YYY-2017
]	
Plaintiff,]	
]	
vs.	]	MOTION TO DISMISS
]	
_____]	
]	
Defendant.]	

Defendant _____ moves this Court to DISMISS the charge of Threatening a Family Member due to the failure of the court to promptly arraign the Defendant, and because the Defendant is likely to remain beyond the reach of Navajo Nation justice for a prolonged period of time. This motion is supported by the following memorandum.

MEMORANDUM

Statement of Facts

1. The present complaint is for an incident which allegedly took place on [DATE OF INCIDENT MONTH 1 LAST YEAR]. The defendant was not arrested for this offense.
2. The present complaint was filed on [DATE COMPLAINT FILED IN MONTH 1 LAST YEAR]. The complaint listed the Defendant's physical address as [LOCATION].

3. Following the issuance of the seventh summons on the complaint, the Court issued a Notice and Order to Submit, requiring the Navajo Nation to respond regarding as to how to proceed. The Navajo Nation response provided an updated address, [SECOND LOCATION], and yet another summons was issued on [DATE 8TH SUMMONS ISSUED ~11 MONTHS AFTER FILING].

4. Defendant was arrested on [ARREST DATE in MONTH 1 THIS YEAR] on a charge of “criminal nuisance” at [LOCATION] and held on a 36-hour domestic violence hold. The present complaint was not served on him before the hold period ended and he was released in the morning on [ARREST DATE +2].

5. Defendant was arrested again at the same address on [SECOND ARREST DATE, SAME AS ARREST DATE +2], for another incident which allegedly took place that evening, under docket KY-CR-XXX-2018.

6. The present complaint was served upon the Defendant in the Adult Detention Facility in Kayenta, Arizona on [SERVICE DATE, aka SECOND ARREST DATE +1], 2018. When served, Defendant was being held on a 36-hour hold for the [SECOND ARREST DATE], incident.

7. On [XXX FILING DATE, aka SECOND ARREST DATE +2], a complaint for Battery of a Family Member was filed against the Defendant for the [SECOND ARREST DATE] incident under docket KY-CR-XXX-2018. A motion to deny release or set bond was filed with this complaint, and arraignment on KY-CR-XXX-2018 only was set for [XXX ARRAIGNMENT DATE, aka SECOND ARREST DATE + 5], along with a bond hearing.

8. On [XXX ARRAIGNMENT DATE], Defendant was arraigned on KY-CR-XXX-2018, but not on any of the other charges pending against him.
9. The Navajo Nation's Motion to Deny Release asserted as grounds for holding Defendant without bail that his actions constituted a felony under 18 U.S.C. §1153. See Navajo Nation's Motion to Deny Release or Set Cash Bail Bond, KY-CR-XXX-2018, [XXX FILING DATE], attached as Exhibit "A."
10. Defendant applied for appointment of counsel in all the aforementioned dockets on [APPLICATION DATE, aka XXX ARRAIGNMENT DATE +22].
11. Defendant was taken into Federal custody on [DETAINDER DATE, aka APPLICATION DATE +2]. The Office of the Navajo Public Defender was not requested as legal counsel for defendant regarding the federal detainer.
12. Counsel was appointed for defendant in all aforementioned dockets on [APPOINTMENT DATE, AKA DETAINDER DATE +1]. The Office of the Public Defender received the files on [APPOINTMENT DATE +3].
13. Counsel for Defendant learned from Kayenta Department of Corrections that Defendant was in Federal custody and on Defendant's behalf filed a Notice to the court of such, with a Motion to vacate the arraignment hearing because Defendant was not available, on [APPOINTMENT DATE +4].
14. Defendant is now in federal custody and likely to remain so for the foreseeable future.

Argument

A. Failing to timely serve and then arraign the Defendant promptly is a violation of his right to a speedy trial.

The Defendant has the right to a speedy trial. 1 N.N.C. §7; 25 U.S.C. §1302(a)(6). Four factors are applied to determine whether the right to speedy trial has been violated: first, the length of delay, second, the reason for delay, third, assertion of the right by the defendant, and fourth, prejudice to the defendant caused by the delay. *Navajo Nation v. McDonald* 6 Nav. R. 1, 11 (Nav. Sup. Ct. 1992).

The length of the delay in this matter has already been over a year because of the failure of the Navajo Department of Public Safety to timely serve the complaint to the Defendant. Further delay could be anything from months to years, and has not yet been determined, nor can it be foreseen with great accuracy. The reason for the delay is two fold: failure by law enforcement to serve the complaint between its filing in [MONTH 1 LAST YEAR] and the eventual effective service of process on [SERVICE DATE, MONTH 1 THIS YEAR], and that the Defendant has been taken into Federal custody, a situation beyond the defendant's control. With this motion, the Defendant asserts his right to a speedy trial. Particularly as the defendant was readily available to the Court, in custody at Kayenta Department of Corrections from the time the complaint was served upon him on [SERVICE DATE] until he was detained by Federal authorities, and appeared before the Court on [XXX ARRAIGNMENT DATE], the prejudice to the Defendant caused by this delay is considerable.

B. Dismissal is the appropriate remedy.

Procedural due process requires that everyone “have an opportunity to be heard at a meaningful time and in a meaningful way.” *Yazza v. Smith*, 8 Nav. R. 191 (Nav. Sup. Ct. 2001). The Court had notice, based upon the Navajo Nation’s Motion to Deny Bail in KY-CR-XXX-2018, that there was some likelihood that Federal authorities would seek to take the Defendant into custody. The court came near to dismissing this matter for failure to serve the complaint once before. Failing to arraign the Defendant promptly once he finally had been served and was in custody created a missed opportunity for satisfactory due process and timely proceedings for both parties in this matter, because the Defendant was taken into Federal custody before the scheduled arraignment date.

It is in the interests of justice, fairness, judicial economy, and due process to dismiss this matter, because the Defendant was not arraigned and cannot be arraigned within a reasonable time. Dismissal without prejudice would preserve the Defendant’s rights without compromising those of the Navajo Nation, which can re-file at a later date should the Defendant return to the jurisdiction of the Navajo Nation within the statute of limitations for this offense, and the Navajo Nation not be satisfied that justice was done in this matter through Federal prosecution.

WHEREFORE, defendant requests that this Court dismiss KY-CR-YYY-2017.

RESPECTFULLY SUBMITTED this ____ day of _____, 2018.

Raven Attwood
Counsel for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was mailed to the Prosecutor’s office on this __ day of __, 2018.

BY: _____

IN THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF KAYENTA, ARIZONA

THE NAVAJO NATION,]	NO. KY-CR-YYY-2017
]	
Plaintiff,]	
]	
vs.	]	FINDINGS AND ORDER
]	
_____]	
]	
Defendant.]	

This is a criminal case that comes before the Court on the issue of whether to dismiss the charge of Threatening a Family Member against Defendant _____, arising from his conduct on [DATE OF INCIDENT].

Defendant has asked for dismissal of this prosecution based upon violation of the Defendant's right to Due Process under 25 U.S.C. §1302(a)(8) and 1 N.N.C. §3, and right to a speedy trial under 25 U.S.C. §1302(a)(6) and 21 N.N.C. §7, such rights to be interpreted in light of Navajo customary and fundamental law.

It is in the interests of the Navajo people as well as the individual defendant to ensure fundamental fairness in the administration of justice. Therefore, the Court FINDS:

1. Defendant was not arraigned on this matter when he appeared before the Court on [XXX ARRAIGNMENT DATE], although the complaint had been filed and served upon him, and the facts in the present complaint were alleged as part of the grounds in the Navajo Nation's motion to hold the Defendant without bail in KY-CR-XXX-2018.
2. It was foreseeable that the Defendant would be subject to Federal Detainer, and the

Court had notice of this because commission of a felony under 18 U.S.C. §1153 was asserted as grounds for the Navajo Nation's Motion to Deny Release or Set Cash Bail Bond in KY-CR-XXX-2018.

3. Failing to promptly arraign the Defendant was a violation of his right to a speedy trial. Although the delay is indeterminate, the prejudice to the Defendant is considerable, the cause for the delay is beyond the control of the parties or this Court, and the likelihood of substantial further delay warrants this finding.

4. It is in the interests of due process, fundamental fairness, and judicial economy to not suspend proceedings for a prolonged period without the consent of the parties.

5. Dismissal of this proceeding is warranted as proper remedy for the violation of the rights of the Defendant.

IT IS THEREFORE ORDERED that the prosecution of Threatening a Family Member is dismissed with/without prejudice and Case No. KY-CR-YYY-2017 is closed.

SO ORDERED this _____ day of _____, 2018.

JUDGE, District Court of the Navajo Nation

OFFICE OF THE NAVAJO PUBLIC DEFENDER

Client Name: _____ Docket No: _____ Date: _____

Legal Counsel regarding the Federal prohibition of the possession of firearms by individuals convicted of a misdemeanor crime of domestic violence under 18 U.S.C. §922(g)(9).

This law states:

It shall be unlawful for any person—

(9) who has been convicted in any court of a misdemeanor crime of domestic violence, to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

This law affects anyone convicted of a misdemeanor under Federal, State, or Tribal law, including in Navajo Nation court, which “has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.” 18 U.S.C. §921(a)(33)(A)(ii).

You are charged with the following offense(s) (marked with an X) which, given the alleged circumstances, may make you subject to this statute upon conviction:

<input type="checkbox"/> 17N.N.C. §303 Criminal Homicide	<input type="checkbox"/> 17N.N.C. §304 Kidnapping	<input type="checkbox"/> 17N.N.C. §305 Aggravated Kidnapping
<input type="checkbox"/> 17N.N.C. §308 Aggravated Arson	<input type="checkbox"/> 17N.N.C. §310 Threatening	<input type="checkbox"/> 17N.N.C. §314 Assault
<input type="checkbox"/> 17N.N.C. §315 Aggravated Assault	<input type="checkbox"/> 17N.N.C. §316 Battery	<input type="checkbox"/> 17N.N.C. §317 Aggravated Battery
<input type="checkbox"/> 17N.N.C. §438 Conspiracy to coerce a minor to engage in sexual contact or a sexual act		
<input type="checkbox"/> 17N.N.C. §439 Kidnapping with intent to commit sexual contact or a sexual act	<input type="checkbox"/> 17N.N.C. §443 Sexual assault	
<input type="checkbox"/> 17N.N.C. §443A Aggravated sexual assault	<input type="checkbox"/> 17N.N.C. §491 Robbery	<input type="checkbox"/> 17N.N.C. §492 Armed Robbery
<input type="checkbox"/> 17N.N.C. §539 Stalking	<input type="checkbox"/> 17N.N.C. §540 Harassment	<input type="checkbox"/> 17N.N.C. §541 Sexual Assault of a Family Member
<input type="checkbox"/> 17N.N.C. §542 Unlawful imprisonment of a Family member	<input type="checkbox"/> 17N.N.C. §543 Aggravated Assault of a Family Member	
<input type="checkbox"/> 17N.N.C. §544 Battery of a Family Member	<input type="checkbox"/> 17N.N.C. §545 Aggravated Battery of a Family Member	
<input type="checkbox"/> 17N.N.C. §547 Trespass with force or violence against a family member	<input type="checkbox"/> 17N.N.C. §549 Threatening a family member	
<input type="checkbox"/> 17N.N.C. §551 Unlawful Use of a weapon against a family member	<input type="checkbox"/> 17N.N.C. §554 Violation of a Family Violence Court Order	
<input type="checkbox"/> 17N.N.C. §555 Robbery of a Family member	<input type="checkbox"/> 17N.N.C. §556 Conspiracy against a family member (to commit one of the violent offenses listed here)	
<input type="checkbox"/> 17N.N.C. §557 Solicitation against a family member (to commit one of the violent offenses listed here)		
<input type="checkbox"/> 17N.N.C. §559 Arson against a family member		

The alleged victim in the offense(s) with which you have been charged meets the relationship definition above because she or he is (marked with an x):

☐ your spouse or ex-spouse (including a common law spouse) ☐ your child ☐ the other parent of your child(ren)
☐ person you now or in the past have cohabited with in a way similarly situated to a spouse, e.g. girlfriend/boyfriend who lived with you
☐ a dependent for whom you are legal guardian, or similarly situated to a legal guardian, e.g. step-child, foster child in your custody.

This law means that upon conviction for the charge(s) above, you risk being charged in Federal Court if you buy, sell, or carry across state lines a firearm or ammunition. The penalty for violating this statute includes fines and up to ten years in Federal prison. Because of holes in the background check system used by licensed gun sellers, a tribal court conviction will not necessarily prevent you from buying a firearm or ammunition. However, should you encounter trouble with the law in future, possession of a firearm could open you up to Federal charges under this law.

By signing this document, you affirm that your appointed Public Defender has explained this law to you, and that you understand the impact of a guilty plea or conviction at trial on your right to own firearms or ammunition.

Defendant signature

Legal Counsel

OFFICE OF THE NAVAJO PUBLIC DEFENDER

Client Name: _____ Docket No: _____ Date: _____

Legal Counsel regarding the Federal Repeat Domestic Violence Offender Statute

18 U.S.C. §117 Domestic assault by an habitual offender

This law states:

(a) **In General.**— Any person who commits a domestic assault within the special maritime and territorial jurisdiction of the United States or Indian country and who has a final conviction on at least 2 separate prior occasions in Federal, State, or Indian tribal court proceedings for offenses that would be, if subject to Federal jurisdiction—

(1) any assault, sexual abuse, or serious violent felony against a spouse or intimate partner; or

(2) an offense under chapter 110A,

shall be fined under this title, imprisoned for a term of not more than 5 years, or both, except that if substantial bodily injury results from violation under this section, the offender shall be imprisoned for a term of not more than 10 years.

You are charged with the following offense(s) (marked with an X) which may make you subject to this statute in a future domestic violence incident upon conviction at trial or following a guilty plea:

<input type="checkbox"/> 17N.N.C. §303 Criminal Homicide	<input type="checkbox"/> 17N.N.C. §304 Kidnapping	<input type="checkbox"/> 17N.N.C. §305 Aggravated Kidnapping
<input type="checkbox"/> 17N.N.C. §308 Aggravated Arson	<input type="checkbox"/> 17N.N.C. §310 Threatening	<input type="checkbox"/> 17N.N.C. §314 Assault
<input type="checkbox"/> 17N.N.C. §315 Aggravated Assault	<input type="checkbox"/> 17N.N.C. §316 Battery	<input type="checkbox"/> 17N.N.C. §317 Aggravated Battery
<input type="checkbox"/> 17N.N.C. §436 Solicitation of a minor for prostitution	<input type="checkbox"/> 17N.N.C. §437 Solicitation involving a minor in sexual contact or a sexual act	
<input type="checkbox"/> 17N.N.C. §438 Conspiracy to coerce a minor to engage in sexual contact or a sexual act		
<input type="checkbox"/> 17N.N.C. §439 Kidnapping with intent to commit sexual contact or a sexual act	<input type="checkbox"/> 17N.N.C. §443 Sexual assault	
<input type="checkbox"/> 17N.N.C. §443A Aggravated sexual assault	<input type="checkbox"/> 17N.N.C. §444 Seduction	
<input type="checkbox"/> 17N.N.C. §445 Sexual exploitation of a minor through electronic communication device		
<input type="checkbox"/> 17N.N.C. §446 Luring a minor by electronic communication device	<input type="checkbox"/> 17N.N.C. §447 Possession of child pornography	
<input type="checkbox"/> 17N.N.C. §448 Incest	<input type="checkbox"/> 17N.N.C. §449 Sexual contact or sexual act with a foster child or stepchild	<input type="checkbox"/> 17N.N.C. §491 Robbery
<input type="checkbox"/> 17N.N.C. §492 Armed Robbery	<input type="checkbox"/> 17N.N.C. §539 Stalking	<input type="checkbox"/> 17N.N.C. §540 Harassment
<input type="checkbox"/> 17N.N.C. §541 Sexual Assault of a Family Member	<input type="checkbox"/> 17N.N.C. §542 Unlawful imprisonment of a Family member	
<input type="checkbox"/> 17N.N.C. §543 Aggravated Assault of a Family Member	<input type="checkbox"/> 17N.N.C. §544 Battery of a Family Member	
<input type="checkbox"/> 17N.N.C. §545 Aggravated Battery of a Family Member	<input type="checkbox"/> 17N.N.C. §547 Trespass with force or violence against a family member	
<input type="checkbox"/> 17N.N.C. §549 Threatening a family member	<input type="checkbox"/> 17N.N.C. §551 Unlawful Use of a weapon against a family member	
<input type="checkbox"/> 17N.N.C. §554 Violation of a Family Violence Court Order	<input type="checkbox"/> 17N.N.C. §555 Robbery of a Family member	
<input type="checkbox"/> 17N.N.C. §556 Conspiracy against a family member (to commit one of the violent offenses listed here)		
<input type="checkbox"/> 17N.N.C. §557 Solicitation against a family member (to commit one of the violent offenses listed here)		
<input type="checkbox"/> 17N.N.C. §559 Arson against a family member		

The alleged victim in the offense(s) with which you have been charged meets the relationship definition above because she or he is (marked with an x):

☐ your spouse or ex-spouse, ☐ your intimate partner (at the time of the offense or in the past)
☐ another person, and the offense could be subject to 18 U.S.C. ch. 110A (arising from an incident which involved crossing state lines or Reservation boundaries during or shortly before the incident).

This law means that upon conviction for the offense(s) above, you will have a conviction on at least _____ prior occasion(s) which could be used against you for the purposes of the habitual domestic violence offender law.

By signing this document, you affirm that your appointed Public Defender has explained this law to you, and that you understand the possible future impact of a guilty plea or conviction at trial if you are prosecuted under Federal law for any later act of domestic violence.

Defendant signature

Legal Counsel

OFFICE OF THE NAVAJO PUBLIC DEFENDER

Client Name: _____ Docket No: _____ Date: _____

Legal Counsel regarding the reason for a No Contest Plea

You are charged with one or more criminal offenses. Your alleged actions may also be prosecuted under Federal law. You can be charged under Federal law for the same actions as under Navajo law because the United States Government is a “separate sovereign” from the Navajo Nation, and both governments have jurisdiction over crimes committed by Indians on the Navajo Nation.

When you are convicted and found guilty of a criminal offense in a Navajo court, with all the protections of the Indian Civil Rights Act, including the right to a trial by jury, the right to legal counsel, the right to remain silent and not be a witness against yourself, the right to confront and cross-examine the witnesses and other evidence against you, and the right to introduce your own evidence and witnesses at trial, that conviction can be introduced in Federal court and used against you.

When you plead **guilty** to a criminal charge, it can be used against you in the same way as a conviction after trial. Furthermore, you are *admitting to* your actions on record in a court of law, while waiving the rights detailed above. These are circumstances which make your guilty plea admissible as evidence against you in Federal court as an admission that you did what is alleged in the Navajo Nation’s criminal complaint.

When you plead **no contest** to a criminal charge, you are still *taking responsibility* for your actions and accepting the consequences of those actions in the form of a judgment and sentence from the Navajo Court, but you do so without actually admitting to anything.

A no contest plea is not admissible in Federal Court under the Federal Rules of Evidence. It cannot be used against you in Federal Court the same way as a guilty plea or as a conviction at trial.

For this reason, you are strongly advised, if you accept a plea offer, to plead NO CONTEST.

By signing this document, you affirm that your appointed Public Defender has explained the difference between a no contest plea and a guilty plea. You also affirm that you understand the possible future impact of a guilty plea or conviction at trial if you are prosecuted under Federal law for your actions, and the reason why you have been advised to plead no contest if you accept a plea offer from the Navajo Nation.

Defendant signature

Legal Counsel

Raven Joaquín Attwood, Attorney
OFFICE OF THE NAVAJO PUBLIC DEFENDER
Post Office Box 1186
Tuba City, Arizona 86045
Telephone: (928) 283-3087

Counsel for Defendant

IN THE DISTRICT COURT OF THE NAVAJO NATION

JUDICIAL DISTRICT OF TUBA CITY, ARIZONA

THE NAVAJO NATION	]	No. TC-CR-_____-2018
]	
Plaintiff,]	
	]	MOTION TO REFUND
vs.	]	CASH BOND
]	
_____]	
]	
Defendant.]	
_____]	

Defendant moves the court to refund the Defendant's cash bond and as grounds states:

1. A bond of \$500 in this matter was posted by [BAILOR] on behalf of Defendant.
2. Thereafter, Defendant appeared for all court hearings in this matter.
3. On [JUDGMENT DATE], a Judgment and Mittimus was issued by the court.
4. On [END DATE OF SENTENCE] Defendant completed his sentence and the judgment of the court has been satisfied.

WHEREFORE, Defendant asks that the court order that the cash bond be refunded to [BAILOR].

RESPECTFULLY SUBMITTED this _____ day of _____, 2018.

Raven Attwood
Counsel for Defendant

Certificate of Service

I hereby certify that a true copy of this motion was Hand-delivered to the Prosecutor on this 26th day of April, 2018.

By: _____

IN THE DISTRICT COURT OF THE NAVAJO NATION

JUDICIAL DISTRICT OF TUBA CITY, ARIZONA

THE NAVAJO NATION,]	No. TC-CR-____-2018
]	
Plaintiff,]	
	]	ORDER
vs.	]	REFUND OF CASH BOND
]	
_____ ,]	
]	
Defendant.]	
_____]	

THIS MATTER has come before this Court on a motion to refund the cash bond in this matter. With good cause shown, the Court FINDS:

[BAILOR] posted a \$500.00 cash bond for the release of the defendant in this matter and the defendant was released from custody.

After release, the Defendant attended all hearings in this matter and complied with the conditions of his release.

A judgment has been issued in this matter and satisfied, and now the cash bond needs to be refunded.

IT IS THEREFORE ORDERED, the \$500.00 cash bond shall immediately be refunded to [BAILOR].

SO ORDERED this _____ day of _____, 2018.

JUDGE, Navajo Nation District Court

Raven Joaquín Attwood, Attorney
OFFICE OF THE NAVAJO NATION PUBLIC DEFENDER
PO Box 1186
Tuba City, Arizona 86045
Tele: (928) 283-3087
Counsel for Defendant

DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF KAYENTA, ARIZONA

THE NAVAJO NATION,	]	NO. KY-CR-_____-2018
]	
Plaintiff,]	
]	
vs.	]	MOTION FOR PAROLE
]	
_____,]	
]	
Defendant.]	

Defendant_____ respectfully asks this Court to grant him parole in order to attend drug and alcohol rehabilitation. This motion is made pursuant to Rule 52(b) and (c) of the Navajo Rules of Criminal Procedure, 17 N.N.C. §§ 220 221, 538, and 1819, and supported by the following facts and argument:

FACTS

1. On [SENTENCING DATE], Defendant was sentenced to 180 days' jail, including 52 days of time served prior to sentencing. Defendant is scheduled for release on [RELEASE DATE].
2. Defendant has completed in excess of one half of his term of incarceration, with good behavior.
3. Defendant completed the ordered Life Value Engagement Sessions.
4. Defendant has, while incarcerated at Kayenta Department of Corrections Adult Detention Facility, completed Substance Abuse Intake/Screening at the Kayenta Department of Behavioral Health Services. Defendant's next step in this process is to complete a Substance Abuse Assessment. See Letter from Gary Holiday,

Kayenta Department of Behavioral Health Services ,dated [LETTER DATE],
attached as Exhibit "A."

5. The victim in this matter, [VICTIM], was granted a five year Order of Protection
against the Defendant on [DATE OF DAPO].

ARGUMENT

Incarceration is always considered an extraordinary measure. 17 N.N.C. §220(A).
Defendant agreed to the present sentence as part of a plea agreement. While incarcerated,
Defendant has taken concrete steps towards inpatient treatment. However, a referral for
treatment from DBHS will serve no purpose unless Defendant is free to go when a bed
comes available.

Ordinarily, parole may be granted upon completion without misconduct of one
half of a sentence of incarceration. 17 N.N.C. §1819(A).

The Defendant is not asking the Court for leniency, but rather for the opportunity
to avail himself of effective rehabilitation. The Defendant is willing to agree to whatever
special conditions of parole the court sets, including adherence to the Order of Protection
against him.

WHEREFORE, the Defendant asks that he be paroled in order to attend residential
treatment.

RESPECTFULLY SUBMITTED this ____ day of ____, 2018.

Raven Attwood
Attorney for Defendant

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing
was mailed and emailed to the Prosecutor's office
on this ____ day of ____, 2018.

BY:_____

IN THE DISTRICT COURT OF THE NAVAJO NATION

JUDICIAL DISTRICT OF KAYENTA, ARIZONA

THE NAVAJO NATION,	]	NO: KY-CR-____-2018
]	
Plaintiff,]	
]	
vs.	]	ORDER MODIFYING
	]	JUDGMENT AND MITTIMUS
_____,]	
]	
Defendant.]	
_____]	

This matter came before the court on a motion for parole.

THE COURT FINDS the defendant is in need of substance abuse treatment in order to effect his rehabilitation, and the Defendant has taken steps towards receiving treatment while incarcerated, and has as completed community service work to satisfy his fine.

IT IS THEREFORE ORDERED that [DEFENDANT] be paroled in this matter, and that as conditions of parole, [DEFENDANT] must have no contact with the victim, [VICTIM], and shall obtain a substance abuse assessment and follow whatever course of treatment is recommended in the assessment.

IT IS FURTHER ORDERED that a Modified Judgment and Mittimus shall be served upon the Defendant and the Navajo Nation reflecting those terms and any other parole conditions the Court sees fit.

SO ORDERED this _____ day of _____, 2018.

JUDGE, District Court of the Navajo Nation



NAVAJO NATION CHILDREN'S CODE

RULES OF PROCEDURE

**OFFICE OF THE NAVAJO PUBLIC DEFENDER
P.O. BOX 1186
TUBA CITY, ARIZONA 86045**

FILE COPY

JCO-10-95

RESOLUTION OF THE JUDICIARY COMMITTEE OF THE NAVAJO NATION COUNCIL

Approving the Navajo Nation Children's Code Rules of Procedure For Use in the Courts of the Navajo Nation

WHEREAS:

1. Pursuant to 2 N.T.C. §571, there is established the Judiciary Committee as a permanent standing committee of the Navajo Nation Council; and

2. The Judiciary Committee of the Navajo Nation Council was established to improve the administration of justice in order to serve the best interests of the Navajo Nation; and

3. 7 N.T.C. §601(a) authorizes the Navajo Nation Supreme Court to adopt rules of pleading, practice and procedures applicable to any or all proceedings in the courts of the Navajo Nation; and

4. The Navajo Nation Supreme Court justices and the judges of the Navajo Nation Courts have reviewed the draft of the Navajo Nation Children's Code Rules of Procedure. Comments received have been incorporated in the final draft (Exhibit A); and

5. The Navajo Nation Supreme Court justices have ordered adoption of the Navajo Nation Children's Code Rules of Procedure on October 4, 1995; and

6. 7 N.T.C. §601(b) requires the approval by the Judiciary Committee of the Navajo Nation Council of all rules adopted by the Navajo Nation Supreme Court; and

7. The Judiciary Committee of the Navajo Nation Council has reviewed the Navajo Nation Children's Code Rules of Procedure, and the Judiciary Committee agrees that the Rules serve the best interests of the Navajo Nation Courts.

NOW THEREFORE BE IT RESOLVED THAT:

The Judiciary Committee of the Navajo Nation Council approves the adoption of the Navajo Nation Children's Code Rules of Procedure, attached hereto as Exhibit A.

SUPREME COURT OF THE NAVAJO NATION

Order Adopting the Navajo Nation Children's Code
Rules of Procedure

WHEREAS:

1. The Navajo Nation Supreme Court was created by the Navajo Nation Council through the Judicial Reform Act of 1985;

2. 7 N.T.C. § 601(a) authorizes the Navajo Nation Supreme Court to adopt rules of pleading, practice and procedure applicable to any or all proceedings in the courts of the Navajo Nation;

3. Pursuant to 7 N.T.C. § 601(a), the Navajo Nation Supreme Court has authorized the development of the Navajo Nation Children's Code Rules of Procedure.

4. The revised draft of the Navajo Nation Children's Code Rules of Procedure has been submitted for review to the Navajo Nation Department of Justice, Navajo Nation Prosecutor's Office, DNA-People's Legal Services, Inc., Navajo Nation Bar Association, and the judges and justices of the Navajo Nation. Comments and suggestions were received from these legal entities, and on June 3, 1991 the Judicial Conference of family court and district court judges approved and recommended that the Navajo Nation Supreme Court adopt the proposed Navajo Nation Children's Code Rules of Procedure which considered and incorporated the comments.

5. The final draft of the proposed Navajo Nation Children's Code Rules of Procedure has been reviewed by the Justices of the Navajo Nation Supreme Court, and the Justices agree that the proposed Navajo Nation Children's Code Rules of Procedure meets the needs of the Navajo Nation courts, and it should be adopted.

IT IS ORDERED THAT:

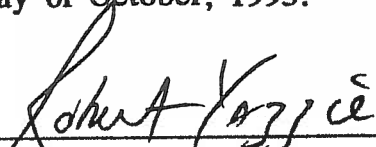
1. The proposed Navajo Nation Children's Code Rules of Procedure, attached as Exhibit A, is adopted by the Supreme Court of the Navajo Nation.

FILE COPY

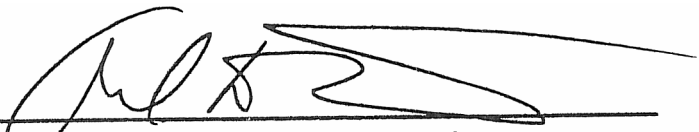
2. The Navajo Nation Children's Code Rules of Procedure shall govern all proceedings involving children in the application of the provisions of 9 N.T.C. § 1101 et. seq.

3. The Navajo Nation Children's Code Rules of Procedure shall become effective on November 1, 1995 and shall apply to all children's proceedings filed on November 1, 1995, and thereafter.

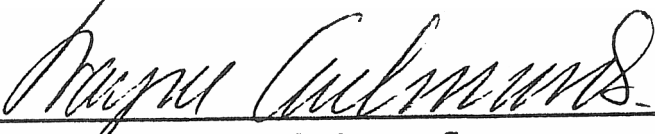
So ORDERED this 4th day of October, 1995.



Honorable Robert Yazzie,
Chief Justice



Honorable Raymond D. Austin,
Associate Justice



Honorable Wayne Cadman, Sr.,
Associate Justice

FILE COPY

NAVAJO NATION CHILDREN'S CODE

RULES OF PROCEDURE

(Effective November 1, 1995)

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PART I:
GENERAL PROVISIONS

RULE 1: SCOPE OF RULES

1 (a) Construction; Citing

These Rules govern the procedure in all actions arising under the Navajo Nation Children's Code. They shall be construed to effectuate the purposes of the Children's Code in a just, speedy and economical manner. These Rules shall be cited as N.N.C.C.R.P. Any provisions within these rules pertaining to adoption or guardianship shall apply only to those matters arising under the Children's Code.

1 (b) Rules of Civil Procedure

Matters not covered by these Rules shall proceed according to Navajo Nation Rules of Civil Procedure.

1 (c) Children's Code

These Rules supplement the Children's Code and are secondary to it.

RULE 2: DEFINITIONS AND TERMS

The following terms and phrases, as used in these Rules, shall have the indicated meanings.

2 (a) Adjudication. The decision of the court which determines the status of a child as a result of a petition being filed.

2 (b) Adjustment. The handling of a complaint in a manner which eliminates the need for filing a petition.

2 (c) Code. The Navajo Nation Children's Code.

2 (d) Complaint. Information and/or allegations regarding a child prior to the filing of a petition.

2 (e) Counsel. A member of the Navajo Nation Bar Association or

associated counsel.

- 2 (f) Disposition. The order entered following an adjudication on the petition.
- 2 (g) Emancipation. This term is used with reference to the emancipation of a minor child from its parents, which involves an entire surrender of the right to the care, custody and earnings of such child as well as a renunciation of parental duties and obligations.
- 2 (h) Entry of Judgment. Occurs on the date the judge signs the order which disposes of the matter.
- 2 (i) Guardian Ad Litem. Any person appointed by the court to speak for the child. A guardian ad litem is not the legal guardian of the person and/or the estate of a child. The guardian ad litem is not the legal counsel.
- 2 (j) Navajo Nation. All lands making up Navajo Indian Country as defined in the Navajo Tribal Code. The Navajo Nation is the government of the Navajo Tribe.
- 2 (k) Necessary Party. Any person who is required under the Children's Code or under these rules to receive notice of the filing of a petition.
- 2 (l) Order. Every document signed by the judge as part of a proceeding including orders prepared by the parties, their representatives, or the court.
- 2 (m) Party. The child, necessary parties or any other person whose presence in the action is required in the interests of justice or designated by the court as a party.
- 2 (n) Petition. The pleading which initiates a case or seeks new or additional relief from the court.
- 2 (o) Pleadings. All papers filed or required to be filed with the court by a party. Pleadings shall include petitions, motions and responses.
- 2(p) Review Hearing. Any hearing, before or after adjudication and/or

disposition, for the purpose of informing the court of the status of the child and/or of the action.

- 2 (q) Ward of the Court. A child under the continuing jurisdiction of the court.

RULE 3: COMMENCEMENT OF ACTION

An action under the Children's Code is commenced by the filing of a petition with the court. The petition shall be filed in the name of the child and shall be signed by a member of the Navajo Nation Bar Association or by a party pro se. Petitions to adjudicate a child delinquent, in need of supervision, or dependent and in termination of parental rights shall be signed by the presenting officer, and in term of paternal rights when petitioner is a government agency.

RULE 4: PARTIES

- 4 (a) Child. The child who is the subject of the action is the named party in all pleadings under the Children's Code.
- 4 (b) Parent(s), Guardian or Custodian. The parents, guardian and/or custodian are necessary parties in actions to adjudicate a child delinquent, in need of supervision or dependent, to terminate parental rights, and all other matters arising under the Children's Code.
- 4 (c) Others. The court on its own motion or upon a petition may designate as a necessary party and other person whose presence is required in the interests of justice.
- 4 (d) Participation of a Necessary Party. A necessary party may file pleadings in an action upon leave of the court and may request relief of the court.
- 4 (e) Purpose of Necessary Parties. The purpose of designating necessary parties is to permit the court to make a full and complete adjudication

matters, and to enable the court to enforce and carry out its orders.

RULE 5: GUARDIAN AD LITEM

- 5 (a) Appointment for Child: The court shall appoint a guardian ad litem to speak on behalf of the child when such appointment is authorized by the Children's Code or when the court determines it is in the best interests of the child. The guardian ad litem shall not be the legal counsel for the child.
- 5 (b) Qualifications: A guardian ad litem may be a member of the Navajo Nation Bar Association or a member of the community who has received training to be a guardian ad litem or whom the court finds can reasonably present the interests of the child or person for whom the appointment is made.
- 5 (c) Duties. The duties of a guardian ad litem are to inform the court on matters regarding the background, environment and needs and wishes of the person for whom appointed, to appear at all proceedings and to speak on behalf of such person.
- 5 (d) Access to Reports and Records. Upon appointment the guardian ad litem shall have access and be provided reports, records and other documents filed or made available to the court in the matter.
- 5 (e) Discharge. The guardian ad litem may be discharged only by order of the court or by the completion of the proceedings. Cases which remain under the continuing jurisdiction of the court shall require the guardian ad litem to continue active participation in the proceedings and to attend review hearings.
- 5 (f) Upon discharge the guardian ad litem shall return to the court all records pertaining to the case.
- 5 (g) Disclosure. The guardian ad litem shall be subject to the privacy provisions of the Code and other laws and shall not disclose any

information obtained pursuant to the duties of guardians ad litem except pursuant to the orders and directives of the court.

RULE 6: SEALING OF RECORDS

Records sealed shall be the entire record of the case. When sealed records are placed on microfilm, they shall be placed on a microfilm cassette set aside for sealed records.

RULE 7: FEES

7 (a) Navajo Nation. Filing fees for petitions filed by the Navajo Nation shall be waived.

PART II:

**DELINQUENCY AND CHILD IN NEED OF
SUPERVISION PROCEEDINGS**

RULE 8: PETITION

In addition to the requirements of the Children's Code the petition shall set forth the date and time the complaint was received by the presenting officer.

RULE 9: ORDER OF PROCEEDINGS

The following shall be the order in which a delinquency or child in need of supervision proceeding is handled:

- (1) Complaint.
- (2) Detention Hearing.
- (3) Preliminary Hearing. At the preliminary hearing the following

shall occur:

- (a) Inform parties as to contents of petition.
 - (b) Advise child and parties of rights of the child.
 - (c) To determine probable cause that this child may have committed this delinquent or child in need of supervision act.
 - (d) In delinquency proceedings determine whether transfer to District Court is warranted.
 - (e) Appoint guardian ad litem if appropriate.
 - (f) Appoint counsel for child is appropriate.
- (4) Provisional Hearing.
 - (5) Adjudicatory Hearing.
 - (6) Care and Rehabilitation Determination.
 - (7) Predisposition Study and Report.
 - (8) Dispositional Hearing.
 - (9) Review Hearing.
 - (10) Hearing Consolidation. At any time other than a transfer hearing, the court may handle all matters at one time or in phases provided that any consolidation is consistent with time requirements.

RULE 10: EVIDENCE

- 10(a) Denial of Allegations: If the allegations of the petition are denied, the court shall receive evidence on the allegations.
- 10(b) Evidence: The Court shall receive relevant and material evidence according to the law and in substantial conformity to the Rules of Evidence.
- 10(c) Admission: If the allegations of the petition are admitted, the court may hear evidence to corroborate the admissions.

PART III:
DEPENDENCY PROCEEDINGS

RULE 11: PETITION

In addition to the requirements of the Children's Code the petition shall set forth the date the complaint was received by the presenting officer.

RULE 12: SERVICE

- 12(a) Duty of Presenting Officer: In proceeding to adjudicate a child dependent, it shall be the duty of the presenting officer to make all reasonable and diligent efforts to obtain service on the parent(s), guardian, custodian or spouse of the alleged dependent child.
- 12(b) Affidavit: The Court may require the presenting officer to submit an affidavit as to the efforts made to obtain service.

RULE 13: ORDER OF PROCEEDINGS

- 13(a) Order of Proceedings: The following shall be the order of proceedings upon a petition to adjudicate a child dependent:
- (1) Petition filed
 - (2) Summons Issued: Service
 - (3) Notice of Custody Hearing and motion for immediate temporary custody.
 - (4) Custody/Detention Hearing, if required
 - (5) Provisional Hearing, if required
 - (6) Adjudicatory Hearing
 - (7) Predisposition Study and Report
 - (8) Care and Rehabilitation Determination

(9) Disposition

(10) Review Hearing _____

- 13(b) Hearing Consolidation: At any time the court may consolidate matters for hearing or hear them in phases provided that any consolidation is consistent with time requirements.

RULE 14: DETENTION HEARING

- 14(a) Motion. If a child is taken into custody a motion for temporary custody shall be filed concurrently with the petition.
- 14(b) Notice of detention hearing shall be issued and served.
- 14(c) Hearing. A detention hearing will be scheduled according to the provisions of the Code.
- 14(d) Change of Placement. After the initial placement, the presenting officer shall provide written notification of any modification in placement to the court.

RULE 15: PLAN OF CARE

- 15(a) Alternative Planning: If it appears unlikely the unity of the family cannot be restored, the plan of care shall set forth an alternative plan for permanent placement.

PART VI:

TERMINATION OF PARENT-CHILD RELATIONSHIP

RULE 16: PETITION: WHO MAY FILE

- 16(a) Involuntary: A petition for a court order to terminate the parent-child relationship may be filed by any person or agency with a legitimate interest in the welfare of the child, or the presenting officer.

- 16(b) Involuntary: A petition for a court order to terminate parent-child relationship rights shall be filed by the Navajo Nation, an agency or a person seeking custody of the child if the parent(s) has voluntarily relinquished rights to the child.
- 16(c) Termination of Parental Rights: Proceedings shall be maintained as separate proceedings from those for adoption. Adoption shall not be granted until all appeal rights pertaining to the termination of parental rights have run. There shall be a termination of parental rights proceeding prior to any adoption proceeding, even where consent is given.

RULE 17: ORDER OF PROCEEDINGS

The following shall be the order in which a termination of parent-child relationship shall proceed:

- (1) Petition Filed.
- (2) Summons Issued; Service.
- (3) Initial Hearing. The court shall conduct an initial hearing with ten (10) days of service of the petition. At the initial hearing, the court shall:
 - (a) Advise the parents of their rights;
 - (b) Appoint counsel for the parents and/or child if appropriate;
 - (c) Appoint a guardian ad litem for the child;
 - (d) Determine the status of the child;
 - (e) Order necessary studies, examination and reports;
 - (f) Set a status hearing or final hearing within sixty (60) days;
 - (g) Make temporary orders pending the next hearing.
- (4) Final Hearing.
- (5) Final Order. The final order shall terminate the parent-child

relationship or deny termination. If the parent-child relationship is terminated the court shall make additional orders for temporary custody.

PART V:

INDIAN CHILD WELFARE ACT

RULE 18: COMMENTARY:

The I.C.W.A. applies to State Court proceedings. Under the Act, the Navajo Nation may intervene to transfer jurisdiction or dismiss the State Court proceeding. If the case is dismissed at the State Court level, the Navajo Nation may initiate any appropriate action in the Family Court pursuant to the Code. The Navajo Nation shall petition the Family Court to accept jurisdiction and transfer the case.

RULE 19: TRANSFER

- 19(a) Transfer Upon Order of Navajo Court: Cases involving Navajo children which originate in a state court may be transferred to a Navajo court upon an order from the Navajo court accepting jurisdiction and transfer of the case.
- 19(b) Initiation: A transfer is initiated by the Navajo Nation filing a petition for the court to accept jurisdiction and transfer of the case.
- 19(c) Contents of Petition: A petition to accept jurisdiction shall contain the following:
- (1) The name, birth date, residence and address of the child;
 - (2) Census number, if any, of the child;
 - (3) Name and address of the court in which the state action is pending;

- (4) Certified copies of the petition and any amendments, and the most recent order filed in the pending State action;
- (5) A concise statement of the jurisdiction of the Navajo courts;
- (6) The names and addresses of parents, guardian, custodians or foster parents of the child; names and addresses of persons seeking guardianship, custody, adoption or possession of the child; the name and address of any agency or department seeking either a disposition or to participate in the disposition of the child.
- (7) The name, address and relationship to the child of the person, agency or department having possession of the child;
- (8) If any matters required to be set forth by this Rule are not known, the petition shall contain the statement that they are not known.

RULE 20: TEMPORARY CUSTODY

Temporary custody and the appointment of a temporary custodian may be requested at the time the petition for transfer is filed.

RULE 21: SUMMONS AND HEARING

- 21(a) Hearing on Petition: Upon the filing of the petition with the court a hearing date on the petition shall be set no earlier than fifteen (15) days and no later than thirty (30) days from the date of filing.
- 21(b) A summons accompanied with a copy of the petition and the notice of hearing shall be served on all persons, agencies and departments identified in the petition in accordance with the N.R.C.P. within the time frame set forth in subsection (A) above.

RULE 22: JURISDICTIONAL HEARING

22(a) At the hearing on the petition to accept jurisdiction and transfer of the case, the court shall hear evidence on the following.

- (1) The nature of the proceedings in state court;
- (2) The jurisdiction of the Navajo courts;
- (3) The location and circumstances of the child;
- (4) The need for temporary custody;
- (5) The qualifications of the proposed temporary custodian.

RULE 23: ORDER

The court shall issue an order within fifteen days of the filing of the petition for acceptance of jurisdiction which shall deny or accept jurisdiction.

23(a) Denial. An order denying jurisdiction and transfer of the case shall state the reasons.

23(b) Acceptance. An order accepting jurisdiction and transfer of the case shall order the Navajo Nation to file notice with the court upon the state court dismissing the case and to effectuate the transfer of case documents.

23(c) If the pending State court action is dismissed, the Navajo Nation shall initiate an original proceeding under the Code.

RULE 24: REVIEW HEARING

24(a) Review Hearing Required: Upon the court being notified of the state court order of transfer, a review hearing shall be set.

24(b) Notice of Hearing: Notice of the date and time of the review hearing shall be given to all necessary parties as identified under these Rules or as designated by the court.

24(c) Proceedings at Hearing: At the hearing the court shall:

- (1) Inform all parties that the matter will now proceed under the Navajo Nation Children's Code;
- (2) Determine the nature of the proceedings;
- (3) Identify the proper party to file a petition pursuant to the Children's Code;
- (4) Set a date no more than thirty (30) days from the date of the review hearing for the filing of the petition.
- (5) Review the temporary custody and placement of the child;

PART VI:

GUARDIANSHIP

RULE 25: CONTINUING JURISDICTION

The court obtains wardship over a child when that child comes under the jurisdiction of the court by a petition being filed with a voluntary agreement. The court has continuing jurisdiction over a child as a result of a petition being filed or a voluntary placement. Such wardship continues until jurisdiction terminates pursuant to the Code.

RULE 26: VOLUNTARY PLACEMENT WITHIN INDIAN CHILD WELFARE ACT, 25 U.S.C. § 1901

- 26(a) Wardship Automatic. Any Navajo child who is domiciled or resides in Navajo Indian country automatically becomes a ward of the court upon voluntarily being placed outside Navajo Indian country.
- 26(b) Filing Consent. The consent of the parents, guardian or custodian to the placement of the child shall be filed with the court.


- 26(c) Contents of Consent. The consent shall indicate with whom the child is being placed and the location of the child outside the Navajo Nation.
- 26(d) Annual Review. The court shall require the parents, guardian or custodian to update the consent annually.

* * *


Navajo Nation Law CLE

Section 5

**Application of the Native
American Child Safety Act in
Navajo Nation Family Courts**
(Christopher B. Chaney)



**UTILIZING
BACKGROUND
CHECKS TO IMPROVE
PUBLIC SAFETY IN
INDIAN COUNTRY**



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**WHAT IS THE
TRIBAL LAW &
ORDER ACT?**

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Tribal Law & Order Act

- ▣ Updated 28 USC 534 to confirm that tribal criminal justice agencies have legal authority to access FBI criminal justice information.
- ▣ "The Attorney General shall ensure that tribal law enforcement officials that meet applicable Federal or State requirements be permitted access to national crime information databases." TLOA, sec. 233(b); 34 USC 41107(1).

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Crime Data as a Tool to Fight Crime

- ▣ Crime data to fight crime that is underway or under investigation.
- ▣ Crime data to reduce opportunities for crime: background checks.

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Tribal Submissions to NGI

- FY 2017 civil fingerprint non-channeler submissions: 6,282
 - 35% increase over FY 2016
- FY 2017 civil fingerprint channeler submissions: 12,120
 - 7% increase over FY 2016
- FY 2017 civil fingerprint NIGC submissions: 82,179
 - .02% increase over FY 2016
- **TOTAL civil submissions = 100,581**

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FBI CJIS Clarksburg, West Virginia



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**Background Check
Legal Authorities**

- Public Law 92-544 (34 USC 41101)*
- Indian Gaming Regulatory Act
- National Child Protection Act/Volunteers for Children Act (NCPA/VCA)*
- Serve America Act
- Native American Housing Assistance & Self-Determination Act
- Indian Child Protection & Family Violence Prevention Act
- Native American Child Safety Act
- Head Start Act
- Purpose Code X
- Criminal justice agencies
- Firearms licensing/permitting

* Fingerprints authorized by State and may only be submitted through the State Identification Bureau

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Public Law 92-544

- Menard v. Mitchell, 328 F.Supp. 718 (D. D.C. 1971)
- disallowed use of FBI maintained criminal history record information for non-federal background checks for employment or licensing purposes because there was no federal law that authorized such use.
- Congress responded by enacting P.L. 92-544, 86 Stat. 1115 (Oct. 25, 1972); codified as 34 USC 41101.

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**Public Law 92-544
(34 USC 41101)**

- Authorizes FBI to provide criminal history records "...to officials of State and local governments for purposes of employment and licensing..."
- Requires a "...State statute...approved by the Attorney General..."
- Approval authority has been delegated to the FBI, Office of the General Counsel, Criminal Justice Information Law Unit.

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**Public Law 92-544
(34 USC 41101)**

- Ways that tribes are incorporated:
 - State statute specifically names tribe and purpose, or
 - State statute adopts tribal resolutions that specify the purpose
- Common purposes: persons with access to children, tribal government employees, and tribal gaming employees.

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Indian Gaming Regulatory Act

- National Indian Gaming Commission has broad authority to conduct background investigations.
- NIGC "...shall conduct or cause to be conducted such background investigations as may be necessary." 25 USC 2706(b)(3).
- Applies to key employees and primary management officials.

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NCPA/VCA

- 34 USC 40102(a) - States can authorize a "qualified entity" to request background checks to determine whether a provider has been convicted of a crime bearing on fitness for providers having responsibility for safety & well-being of children, elderly, or disabled.
- Definition of "State" does not include "Tribes" - 34 USC 40104(11).

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NCPA/VCA

- However, definition of “qualified entity” can include a public organization “that provides care or care placement services...including an organization that licenses or certifies others to provide care or care placement services...” – 34 USC 40104(10).
- A state can designate an appropriate tribal government agency (or a tribal non-governmental entity) as a qualified entity.

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Serve America Act

- Individuals serving with the Corporation for National and Community Service – including AmeriCorps.
- 42 USC 12645g
- 45 CFR 2540

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**Native American Housing Assistance
& Self-Determination Act**

- Applicants for employment with a tribal housing authority.
- Applicants for tenancy in a tribal housing authority property.
- Name-based query may be conducted by law enforcement to determine whether there is information. If there is information, then fingerprints must be submitted to obtain the criminal history record information.
- 25 USC 4138

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**Public Law 101-630
(25 USC 3207(a-c))**

- Requires background checks for persons being considered for employment by Tribes (that receive federal contract/compact funding) in positions that have regular contact or control over Indian children.
- Tribes can set standards more stringent than DOI or HHS standards.
- 25 USC 3207(a-c)

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**Native American Child Safety Act
(2016)**

- Requires background checks for persons being considered to serve as tribal court ordered foster parents. Must do:
 - FBI – national background check, and
 - Also, check state child abuse/neglect registries, National Sex Offender Public Registry, tribal records & registries.
- 25 USC 3207(d)

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Head Start Act

- Requires background checks for tribal Head Start employees. Must do:
 - FBI – national criminal history check,
 - State – criminal history check, or
 - Tribal – criminal history check.
- 42 USC 9843a(g)

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Purpose Code X

- 28 CFR 901.2 & 901.3 – allows for name-based check to be followed by the delayed submission of fingerprints.
- BIA OJS submitted a proposal for approval to the National Crime Prevention and Privacy Compact Council to assist tribal agencies during emergency child placements, in absence of state laws governing such access.
- Compact Council approved on May 13, 2015.

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Purpose Code X

- Each tribe must be approved to participate by BIA OJS.
- Exigent name-based check to be conducted by BIA OJS upon tribal government agency request.
- Residents must consent to provide fingerprints for a national check; if residents fail to consent, child may not be placed in that home.
- Fingerprint-based check to be submitted within 15 calendar days.

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Criminal Justice Employment

- Criminal history record information can be accessed by criminal justice agencies to screen employees and applicants for employment for criminal justice agencies.
- 28 CFR 20.33(a)(1)

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**National Instant Criminal
Background Check System (NICS)**

- ❑ FBI CJIS NICS Rulemaking
 - 79 FR 69047-51 (Nov. 20, 2014) – effective Jan. 20, 2015
- ❑ 28 CFR 25.6(j)(3) - allows tribal criminal justice agencies to access NICS for background checks pertaining to disposal of firearms in possession of tribal criminal justice agencies.

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**National Instant Criminal
Background Check System (NICS)**

- ❑ FBI CJIS NICS Rulemaking
 - 79 FR 69047-51 (Nov. 20, 2014) – effective Jan. 20, 2015
- ❑ 28 CFR 25.6(j)(1) - allows tribal criminal justice agencies to access NICS for background checks pertaining to issuance of firearms-related permits or licenses (including firearm possession, acquisition, transfer, or carrying of a concealed firearm).

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Uniform Crime Reporting

- ❑ FBI CJIS Uniform Crime Reporting
- ❑ Tribal statistics in Offenses Known to Law Enforcement – Table 11.
- ❑ Helps tribal officials spot trends and plan effectively.

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▣ Questions?

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